REPORTS

OF

CASES

ARGUED AND DETERMINED

In the High Court of Chancery,

IN THE TIME OF

Lord Chancellor HARDWICKE.

BY

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CURSITOR BARON OF THE EXCHEQUER.

The THIRD EDITION, revised and corrected;
With NOTES, and REFERENCES to FORMER and MODERN
DETERMINATIONS, and to the REGISTER'S BOOKS,

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CASES



CASES

ARGUED AND DETERMINED IN THE TIME OF

LORD CHANCELLOR HARDWICKE.

Johnson v. *Brown*, *November* 7, 1743. Case 1.

Where the defendants denied all the equity of a bill, and the plaintiff brings the cause to a hearing on bill and answer only, in order to get off with 40 s. costs; the court, on dismissing the bill upon the merits, gave costs to be taxed.

A Bill was brought for an account by a creditor of a bankrupt against the assignees.

The assignees put in an answer denying all the equity of the bill, and the plaintiff brought the cause to a hearing, on bill and answer only.

Lord *Hardwicke* upon the merits dismissed the bill with costs to be taxed; for he said the plaintiff in this case avoided replying, in hopes of saving costs, and that he would not encourage a practice which was done merely to get off with forty shillings costs; for if a motion had been made to dismiss the bill for want of prosecution, the plaintiff knew the defendant would have been intitled to full costs (1).

(1) *Vide ante* 2 vol. 288.

Lacon v. *Mertins*, *November* 9, 1743. Case 2.

S. C. 1 Wilf. 3
1 Vez. 312.

Lord *Hardwicke* on the circumstances of this case decreed an agreement to be carried into execution in favour of the administrator of *H.* against the heir at law of *H.*

JOHN Hay and *Elizabeth* his wife, the heir and devisee of *Simon Degge* deceased, being seised in right of *Elizabeth* of divers lands in *Derbyshire*, held by lease from the dean of *Lincoln* to the said *Simon Degge* and his heirs for three lives, *viz.* the life of *Simon Degge*, *Elizabeth* his wife, and the said *Elizabeth Hay*, and also seised of the inheritance in fee expectant on the death of dame *Elizabeth Saunderson*, grandmother to *Elizabeth Hay*, and of her mother, in the manor of *Bootbby*, and divers lands in *Lincolnshire*: They borrowed on the 10th of *July*, 1735, 1000 *l.* of *Thomas Mosely*, and for securing thereof by lease and release and fine conveyed to *Mosely* and his heirs the said manor and lands in *Derbyshire*, and on borrowing the further sum of 800 *l.* they conveyed to *Mosely* the lands in *Lincolnshire*, and on *Mosely*'s advancing 200 *l.* more,

 they

they subjected both estates with the payment of the several sums of 1000 *l.* 800 *l.* and 200 *l.* but, before any part of the principal and interest was paid, *John Hay* died without issue, and his wife became solely seised, and in *November*, 1737, borrowed of *Mosely* the further sum of 240 *l.* 0 *s.* 6 *d.* which, with 159 *l.* 19 *s.* 6 *d.* due for interest, made 2400 *l.* and by indorsement on the second mortgage deed subjected both estates with payment of the 2400 *l.* and *Elizabeth* being desirous of disposing of her interest in the *Lincolnshire* estate, and to add a third life to the lease of the *Derbyshire* estate, in order to raise a fund for the payment of her debts, employed one *Forster* to treat with *the defendant Mertins*, when, after divers meetings, *Forster*, on behalf and with the consent of *Elizabeth Hay*, came to the following parol agreement, that *Elizabeth*, in consideration of 2260 *l.* 10 *s.* to be paid by *Mertins*, should convey the estate in *Lincolnshire* to him and his heirs, subject to the estates for lives of Lady *Saunderson* and *Elibeth Degge*, and the purchase money to be applied towards the discharge of *Mosely*'s mortgage; and it was also agreed that the lease of the *Derbyshire* estate should be renewed, and a third life added, *viz.* the son of the defendant *Mertins*, and that thereupon he should lend to *Elizabeth* by way of mortgage and on the security of the *Derbyshire* estate 1600 *l.* in order to raise a fund for payment of her debts and the rest of *Mosely*'s mortgage, and also to enable her to pay 375 *l.* fine for the said renewal, and *Mertins* in part of the agreement paid *Elizabeth* 100 *l.* for which he took her note, and on the death of Lady *Saunderson*, he, in consideration thereof, farther agreed to add 140 *l.* to the 2260 *l.* 10 *s.* making together 2400 *l.* 10 *s.* and in further execution of the agreement paid *Elizabeth* another 100 *l.* for which he took her note, and afterwards another 100 *l.* and also 400 *l.* to enable her to pay the fine to the dean of *Lincoln*, and to add a third life in the *Derbyshire* estate, for which he took a bond till the agreement could be completed, out of which sum she paid 375 *l.* and a new lease was taken of the *Derbyshire* estate, wherein the life of *Mertins* the son was inserted with the approbation of *Mertins* the father according to the parol agreement: before the same was perfected *Elizabeth Hay* died intestate, leaving the defendant *Degge* her heir at law.

The plaintiff being a large creditor of *Elizabeth Hay*, by simple contract, having procured letters of administration in trust for himself and the rest of the creditors, brings his bill, praying an account of the intestate's real and personal assets, and of her debts, and to receive a satisfaction out of the real for so much of the personal as had been exhausted in discharge of the specialty creditors, *and that the agreement entered into with the defendant Mertins may be specifically carried into execution*, and that he may be compelled to take a conveyance of the *Lincolnshire* estate, and advance the 1600 *l.* on the *Derbyshire* estate

eſtate as a fund for the payment of the inteſtate's debts, and that *the defendant Degge, the heir at law*, might convey to *Mertins* as the court ſhall direct, or in caſe he does not, that *Mertins* may hold the eſtates to him and his heirs.

The defendant *John Mertins* by his anſwer admitted all the facts and circumſtances relating to the parol agreement, as charged by the bill, and offered to perform it, and complete his purchaſe of the *Lincolnſhire* eſtate, and advance the 1600 *l.* on the ſecurity of the *Derbyſhire* eſtate, provided he be allowed the ſeveral ſums advanced on the foot of the agreement out of ſuch purchaſe and mortgage money, and be permitted to hold the eſtate in *Lincolnſhire* to him and his heirs, and ſo as the leaſe of the *Derbyſhire* eſtate be renewed, and the lives fallen therein ſince making the agreement be filled up.

The counſel for the defendant *Degge*, the heir at law, inſiſted he was an intire ſtranger to all the tranſactions between *Mertins* and *Elizabeth Hay*, but if any ſuch *parol agreement* was made, he was not, nor could be bound, or any ways affected thereby, in regard the ſame, or any part thereof, did not appear to have been reduced into writing, nor in any ſort performed by *Elizabeth Hay* in her life-time.

LORD CHANCELLOR,

The firſt queſtion is, Whether the agreement inſiſted on by the bill, and admitted by the anſwer of the defendant *Mertins*, ought, upon theſe circumſtances, to be carried into execution; what makes this particular, is, if the bill had been brought by Mrs. *Hayes* in her life-time, and the defendant *Mertins* had admitted the agreement, though he had inſiſted on not performing it, the court would have decreed it; becauſe the admiſſion takes it out of the ſtatute of frauds and perjuries.

The ſecond queſtion is, Whether, as between the repreſentative of Mrs. *Hayes*'s perſonal eſtate, and the defendant *Mertins* and Mrs. *Hayes*'s heir at law, it ought to be performed?

It has been objected by the counſel for the heir at law, that the agreement is not in writing, nor concluded; and if it was reduced to a certainty, yet there has not been ſufficient part-performance.

Now it is clear to me that there was a certain agreement, with a variation afterwards from an accident, by which the eſtate became more valuable; for it does not appear that Mrs. *Hayes* had the leaſt intention of breaking off the agreement, but inſiſted only on an advanced price, as it was natural and reaſonable for her to do: and it is likewiſe in evidence, that the defendant *Mertins* agreed to give more, and that Mrs. *Hayes* deſired him to pay the third ſum.

There are ſeveral ways of part executing an agreement (1).

If

(1) As to the part performance of agreements, ſee the following caſes, *Butcher* v. *Stapley*, 1 *Vern.* 363. *Allſop* v. *Patten*, *ibid.* 472. *Pyke* v. *Williams*, 2 *Vern.* 455. *Hales* v. *Vanderbcem*, *ibid.* 617. *Lockey* v. *Lockey*, *Pre. Cha.* 519. *Maxwell* v. *Montacute*, *ibid.* 526. *Seagoode* v. *Meale*, *ibid* 500. *Pengal* v. *Roſs*, 2 *Eq. Ca. Ab.* 46. *pl.* 12. *pl.* 16. *Earl of Aylesford's caſe*, 2 *Stra.* 783. *Clerk* v. *Wright*,

LACON v. MERTINS.

If possession is delivered, that is a strong evidence of the part-execution of an agreement.

Delivery of possession, or payment of money, is a part performance of an agreement not reduced into writing.

The statute of frauds and perjuries goes equally against making a mortgage of a real estate without being in writing, as against a purchase, if not in writing, for as the last can be no lien, neither can the other be a security.

Paying of money has been always held in this court as a part-performance.

It is sworn positively in this case, that the money was applied for, and paid absolutely upon the foot of the agreement.

As to Mrs. *Hayes*'s taking notes of the defendant *Mertins* instead of the money, the evidence being, that they were given on account of the purchase-money, will take off the force of the objection.

It is said it must be such an act done, as appears to the court would not have been done, unless on account of the agreement; and to be sure this is right.

But as to the other objection, that it must be certain at all events that the agreement should be performed even independent of the title, whether it can be made out or not, is carrying it too far, and would hold equally had the agreement been in writing, for whatever the title may be, still Mr. *Mertins* would have had a lien upon the estate by virtue of the agreement.

Where the mortgagor of a leasehold estate has not covenanted, that he will procure the lives to be filled up, the mortgagee may do it, and on adding the expence of renewal to the principal of the mortgage, it shall carry interest.

If there is a leasehold estate that is mortgaged, and no covenant on the part of the mortgagor that he will procure the lives to be filled up, the mortgagee cannot compel him to do it, but must pay the expence of renewing, and then reimburse himself by adding it to the principal of the mortgage, and it shall carry interest (1).

Upon the whole I am of opinion that, upon all the circumstances appearing in this case, the agreement entered into between *Elizabeth Hay* in her life-time, and the defendant *Mertins* for the purchase of the reversion of her estate in *Lincolnshire*, for the sum of 2400*l.* 10*s.* and for the mortgage of the leasehold estate for lives in *Derbyshire*, for the sum of 1600*l.* ought to be performed, and carried into execution, and do order and decree the same accordingly; " and do direct the " Master to compute interest on the 700*l.* paid by *Mertins*

Wright, *ante* 2 vol. 13. 499. *Walker* v. *Walker*, *ante* 2 vol. 100. *Owen* v. *Davis*, 1 *Vef.* 82. *Taylor* v. *Beech*, *ibid.* 297. *Potter* v. *Potter*, *ibid.* 441. *Legal* v. *Miller*, 2 *Vef.* 299. *Whitbread* v. *Brockhurst*, 1 *Bro. Cha. Rep.* 404. 417. *Gunter* v. *Halsey*, *Amb.* 586. It has been held, that marriage is not a part performance of a parol agreement. *Redding* v. *Wilkes*, 3 *Bro. Cha. Rep.* 400. *et vide Dundas* v. *Duters*, *Vef.* Junr. 196.

(1) Vide *Manlove* v. *Ball*, 2 *Vern.* 84.

" to

"to *Elizabeth Hay* at different times, towards his purchase "and mortgage money, at the rate of 4*l. per cent. per ann.* "from the respective times of payment thereof; and the Master also to take an account of the principal and interest due "to the defendant Mrs. *Harris*, the executrix of Mrs. *Dormer*, "the representative of *Kirk* the assignee of the mortgage to "*Mosely*, and to tax her and Lady *Bishop*'s costs, the heir at "law of Mrs. *Dormer*, and decreed that *Mertins* shall pay "Mrs. *Harris* what shall be so found due for principal, interest and costs, and on such payment, and to lady *Bishop* "her costs, do order Lady *Bishop* to convey to *Mertins* the "estate in *Lincolnshire*; and further order that the defendant "*Mertins* do pay to the plaintiff, the administrator of *Elizabeth Hay*, the residue of the 1600*l.* after deducting what "shall be due to him for the 700*l.* and interest; and thereupon "order Mrs. *Harris* to convey to *Mertins* the leasehold estate "in *Derbyshire* by way of mortgage; for securing the repayment of the sum of 1600*l.* with interest at 4*l. per cent.* subject to a redemption by *Degge*, the heir at law of *Elizabeth* "*Hay*, and after such conveyance made of the *Lincolnshire* estate, "do order the possession thereof to be delivered to *Mertins*, and "that he and his heirs do hold the same against *Degge* and his "heirs; and it being admitted that there are but two lives now "subsisting on the leasehold estate, I order that *Mertins* be at "liberty to renew the lease thereof by adding a new life, and "that what shall be paid by him for the fine and charges of such "renewal be added to the principal money advanced by him on "the security of the said estate, and be included in his mortgage to carry interest in the like manner (1).

LACON *v.* MERTINS.

[5]

(1) *Reg. Lib. B.* 1743. fol. 95.

Ex parte Roberts in November, 1743, *amongst the lunatic Petitions.* Case 3.

S. C. post. 308.

LORD CHANCELLOR,

THIS is a complaint upon these grounds:

First, Misbehaviour of the commissioners.

Secondly, Misbehaviour of the jury.

Thirdly, The finding of the verdict.

As to the first part of the complaint against the commissioners, it appears to be groundless and vexatious.

As to any misbehaviour in the jury the evidence is very slight, and is intirely answered, for it appears that Mr. *Robert's* counsel desired he might dine again with them.

The other part of the petition deserves more consideration.

It is objected to as a verdict against evidence, but I think there is nothing satisfactory in the affidavits to induce me to be of that opinion. [6]

If it is not against evidence, then the next question is, in what method it must be gone into.

 There

Ex parte ROBERTS

Where there is any misbehaviour in the execution of an inquisition of lunacy, the court upon examining into it may, if they see cause, quash it, and direct a new commission.

There can be no *melius inquirendum*, for that is only grantable on the part of the crown; but where there is any misbehaviour in the execution of an inquisition, it must be examined into, and if the court see cause they may quash it, and direct a new commission; but a *melius inquirendum* is for the crown, who cannot traverse as the subject can.

But what ground is there for me to quash the present inquisition? The commission was very solemnly granted upon inspection, and what would be the consequence if I should quash it? It is impossible to have an inquisition more solemnly taken, and at last no body would be bound by it; this would be only putting the parties to an useless expence.

The question therefore is, Whether there is any ground to do any thing, and what?

As to the grounds, I do not see sufficient from the affidavits, but from the second inspection I think there is; he has certainly appeared much better than he did at a former inspection, and his appearance now does not prove him to be either a fool or madman, and it is not put upon his being an ideot.

Fitzherbert's Natura Brevium proves, that it is a common method to inquire by inspection after an inquisition returned, and there have been many cases of that sort: but if upon inspection the Chancellor is at all doubtful, there ought to be some better method of determining it: and the *St.* of 2 *Ed.* 6. *ch.* 8. *sect.* 6. seems to be made for that purpose.

"If any person be or shall be untruly founden lunatick, &c. "be it enacted, that every person and persons grieved or to be "grieved by any office or inquisition shall and may have his or "their traverse to the same immediately, or after, at his or their "pleasure, and proceed to trial therein, and have like remedy "and advantage as in other cases of traverse upon untrue inqui-"sitions or offices founden."

But it was objected, that if the party is by law intitled to a traverse, he had no need to apply to this court; and that was my apprehension when first it was opened; but Sir *John Cutt*'s case in *Ley* 86, 87. makes it more doubtful, whether he has such a right; however, without the leave of this court the custody
[7] could not be suspended; and that seems to be the reason of the orders by Lord *King* in the case of Mrs. *Smithie*, upon the making of the second of which she appeared in court.

The question therefore is, Whether I shall grant leave for the lunatick to traverse or not.

The person against whom the commission of lunacy issued, on the different appearance he made upon a second inspection, was allowed to traverse the inquisition, and the grant of the custody suspended till further order.

Upon reasonable terms I am willing to put it in some method of inquiry, and it will be for the advantage of all parties; for if I grant the custody, the committees must bring a bill to set aside the settlement which he has made of his estate; and Doctor *Finney* would have a right to insist upon the validity of it, so that an issue must be directed to try it, and such an issue

would

would be a greater expence to the parties than a traverſe, and therefore I aſked whether Doctor *Finney* would ſubmit to be bound by the traverſe; for though it would be binding againſt Mr. *Roberts*, it would not be ſo againſt Doctor *Finney* as to the grant of the cuſtody of the land, who claims as a purchaſer.

It has been objected, that great miſchief would ariſe in caſe the grant of the cuſtody ſhould be ſuſpended, and it is ſaid that then there would be a traverſe taken in every caſe; and to be ſure great miſchief would ariſe if it ſhould be lightly come into by the court, yet there are many caſes where notwithſtanding the finding the court has ſuſpended the cuſtody; and there was a caſe before me lately of that ſort; and here can be no great inconvenience from ſuſpending it in the preſent caſe, for if any thing is done in regard to the eſtate, it will abide the event of the traverſe; however, leſt any ill uſe ſhould be made of it, I ſhall ſuſpend it only till further order (1).

Mr. Attorney General has cited Sir *John Napper*'s caſe, *Trin. term* 10 *Ann.* in which there was a traverſe, and *Smithie*'s caſe in 1728, which was a motion for leave to traverſe *by attorney*, which was oppoſed; but he ſaid it was there agreed that a traverſe waa given by 2 *Ed.* 6. but that it muſt be in *propriâ perſonâ*; and Lord Chancellor ordered to be attended with precedents, which he ſaid was only to ſhew in what way the traverſe was to be; and afterwards many precedents were ſhewn, but there was no caſe where an ideot had traverſed by attorney, though many where a lunatick had: therefore Lord Chancellor in that caſe thought that it being the caſe of an ideot, ſhe muſt appear in perſon, which ſhe did accordingly, and leave was given her to traverſe. *Vide Stone*'s caſe in *Tremaine's Pleas of the Crown* 653, a precedent of a traverſe; and for the doctrine of traverſing an inquiſition, *vide* 4 *Co.* 54 *b.* the caſe of *The Commonalty of the Sadlers*; and 8 *Co.* 168. *Paris Stoughtor*'s caſe. Sir *T. Jones* 198. *Shower* 199. S. C. *Skinner* 45. S. C.

Vide 18 *H.* 6. by which there ought to be a month's time between the return of the inquiſition, and the grant of the cuſtody, and land, in order for the parties to come in and tender ſuch traverſe. [8]

(1) Vide *Ex parte Barnſley, poſt.* 184.

Tinney v. *Tinney*, *November* 15, 1743. Caſe 4.

A husband in his life-time gave a bond in truſt to ſecure to his wife 400*l.* in caſe ſhe ſurvived; parol evidence to ſhew it was intended at the time in lieu of dower and that the wife acknowledged it to be ſo cannot be allowed, being within the ſtatute of frauds and perjuries.

A Bill was brought for dower, the defendant the heir at law inſiſts that the huſband in his life-time gave a bond in a certain penalty in truſt to ſecure to his wife 400*l.* in caſe ſhe ſurvived, and that it was intended at the time in lieu of dower, and that ſhe acknowledged it to be ſo, and offered to read evidence of her acknowledgment.

Tinney v. Tinney.

A general provision for a wife, is not a bar of dower, unless expressed to be so; but the words in a bond to secure a sum of money for her livelihood and maintenance have been determined to be a bar of dower.

Lord Chancellor,

I am of opinion that parol evidence cannot be allowed in this case; being within the statute of frauds and perjuries, and that a *general provision* for a wife, was not a bar of dower, unless expressed to be so (1): In the case of *Lawrence* v. *Lawrence* (2), Lord *Somers* held a devise of lands generally to the wife to be in bar of dower; it went up afterwards to the house of Lords, and the decree was reversed: in the case of *Vizard* v. *Longdale*, 5 *Geo.* 1. Sir *Joseph Jekyll* held the words in a bond to secure a sum of money for her livelihood and maintenance was no bar of dower, Lord Chancellor *King* was of opinion that it was a bar of dower and said it was within the equity of the *St.* of *Hen.* 7. of jointures, and therefore reversed Sir *Joseph Jekyll's* decree (3).

(1) *Reg. Lib. B.* 1743. fol. 52.

(2) 1 *Eq. Ab.* 218. S. C. Vide the cases cited in the note to *Galton* v. *Hancock*, *ante*, 2 vol. 427.

(3) 1 *Vef.* 55. S. C. Vide *etiam Walker* v. *Walker*, 1 *Vef.* 54. *Warde* v. *Warde*, *Amb.* 299.

Case 5. *Gascoigne and Others* versus *Barker*, *December* 15, 1743, *on a Rehearing.*

S. C. 1 Vef. 63. 121.

An heir is not to be disinherited unless by express words or a necessary implication; and the rule holds equally where he is an heir of *customary lands*.

A parenthesis is not to be rejected in legal cases, though according to the rules of grammar a sentence may be complete without it.

A Question was made in this cause on the will of *Scorey Barker*, which was as follows:

"I give to my son *Henry* all my lands, tenements and hereditaments, in possession and reversion, freehold and copyhold in the parish of *Chiswicke*, or elsewhere in the county of *Middlesex*, (*which* (1) copyhold lands I have surrendered to the use of my will) to him and his heirs.

Mr. Attorney General insisted, that *all the copyhold lands* passed, and that the words in the parenthesis are superfluous, and *that it is an absolute devise; and the subsequent words may be rejected, according to the maxim in law, *utile per inutile non vitiatur;* and in support of this doctrine cited *Hob.* 171. *Marsh's Rep.* 31, 41. *Dyer* 376. or if the court should be of opinion not to reject these words, then he insists that they are large enough to extend to all the testator's copyhold lands, and ought not to be restrained to a part only.

[*9]

Lord Chancellor,

The first question is, whether the words in the parenthesis, are to be taken as restrictive of the first words of the devise, and I can take them no otherwise.

This is the case of lands devised by general words; if instead of this the testator had said, I give my messuages with the appurtenances called *the King of Bohemia's head*, that would have been a different case, and I should have thought the subsequent words a mistake only in the description.

(1) It seems Lord *Hardwicke* laid great stress upon this relative pronoun *which*. See 1 *Vef.* 64.

But

GASCOIGNE v. BARKER.

But when a man does not make a certain definitive deſcription, it is very difficult for courts of juſtice not to conſtrue the ſubſequent reſtrictive words, as explanatory of the former.

As to the caſe in *Marſh's Rep.* of tithes, it is not ſimilar to this, for if they had conſtrued it otherwiſe, the will muſt have been abſolutely void: ſo likewiſe in the caſe in *Dyer*, where a man deviſes his meſſuages, late *Richard Cotton's*, &c. if the court had ſuffered the miſtake to prevail, it would have made the deviſe void.

But here the conſtruction I make will have an effect as to part of the copyhold lands, which are actually ſurrendered, though not as to the whole.

The caſe in *Cro. Car. Chamberlain* verſus *Turner* 129. does not come up to this: "I deviſe the houſe or tenement wherein "*William Nicholls* dwelleth, called the *White Swan* in *Old* "*Street*, to *Henry Gallant*, my daughter's ſon, for ever; and "the queſtion was, whether all the houſe paſſed or the entry, "and thoſe three rooms which were in *William Nicholls*'s poſſeſ- "ſion only; and three judges were of opinion that the whole "houſe paſſed."

I wonder how it held ſo much debate, for the previous part of the deſcription being true, it was of no conſequence if there were twenty other lodgers, as *William Nicholls* lodged there likewiſe.

An obſervation has been made on it's being in a parentheſis, that the ſentence for this reaſon is independent and complete without it, and therefore this may be rejected as ſuperfluous.

It is true with regard to the niceties of grammar, the obſervation may be right in ſome inſtances. [10]

But in legal caſes a parentheſis is not to be rejected: beſides, there are many inſtances in the common kind of writing where commas only are uſed inſtead of a parentheſis, therefore this may be laid out of the caſe.

But what makes it ſtill ſtronger, there is a plain reaſon here for a parentheſis.

Becauſe in the former part of the deviſe the teſtator had coupled the words copyhold and freehold together, and therefore he was under a neceſſity of throwing it into a parentheſis with the repetition of the word copyhold.

So that the authorities do not come up to the caſe made by Mr. *Henry Barker* the deviſee, for thoſe caſes are all in grants.

I have a doubt whether in the caſe of grants the conſtruction is more ſtrict than in wills, for if a man grants to another ſuch and ſuch houſes in the occupation of *A. B.* and *C.* and afterwards excepts the houſe in the occupation of *B.* the exception is void, becauſe they will rather reject the ſubſequent exception entirely, than the grant itſelf ſhould be void.

This is a queſtion between an heir and deviſee, and an heir is not to be diſinherited unleſs by expreſs words, or a neceſſary implication: and I know no diſtinction from this rule where the heir is *an heir of cuſtomary lands*, any more than where he is of freehold.

The

GASCOIGNE v. BARKER.

The great objection, which has some weight, is, that there is part of the same inn or house which has been surrendered: and if the testator had described it by name, I should have been of opinion the whole would have passed though part only had been surrendered.

But it appears by the surrenders themselves, which were at different times, that part of the inn was not bought till some time after the first surrender, and therefore this fact clears up, and explains the intention of the testator.

So that the court must make so many stretches here, in order to disinherit the customary heir, that it is much better to let the words have their plain and obvious meaning, though the defendants are younger children, and claim it as a provision.

The decree must be affirmed (1).

(1) In *Banks* v. *Denshire*, 1 *Ves.* 63. *post.* 585. Lord *Hardwicke* observes, that he determined the above case relative to the king of *Bohemia*'s head with *great reluctance.* Indeed the parenthesis in this case (which seems to have been the ground of the determination) appears to differ but very slightly from that in *Banks* v *Denshire*. Vide *Allen* v. *Poulton*, 1 *Ves.* 121.

[11]
Case 6.

Lovell versus *Lovell*, *November* 23, 1743.

The surrender of copyhold estates must have the same construction with feoffments at law, and other conveyances, and not as a will; and if the limitations of a copyhold are so framed, as by the rules of law they are void, they must take their fate, and no intention can make them good.

JOHN Lovell surrendered to *William Lovell*, brother of *John Lovell*, the copyhold premisses in question, until *Thomas Lovell*, son of *Ralph Lovell*, and brother also of *John Lovell*, shall attain twenty-one, and after such age to the said *Thomas Lovell*, his heirs and assigns for ever. Signed *John Lovell.*

Indorsed, by agreement between *John* and *William Lovell*, that the said *William Lovell* is to receive the rents, &c. until *Thomas* attains twenty-one, and then to account to him for the same, but not before.

J. Lovell.
W. Lovell.

John died the 19th of *November* 1715, without issue, leaving *William* his eldest brother and heir, who enjoyed the said premisses till the 16th of *January* 1734, when he died; *Thomas* the son of *Ralph*, and brother of the plaintiff, died an infant the 12th of *March* 1715, without issue before the plaintiff was born, so that the said *Thomas Lovell* deceased having no brother or sister born at his death, and being then about nine months old, *William Lovell* deceased was his heir at law likewise.

Thomas Lovell the surrenderee dying before he attained twenty-one, the question is, whether the plaintiff as brother of *Thomas* is intitled under the surrender of *John Lovell* to an account of the rents, &c. such contingency as in the surrender never happening; or whether the defendant *William Lovell* deceased, as heir to the surrenderor, is not intitled to both; or whether the estate is not liable to an account for the profits, and to whom.

Mr. At-

Mr. Attorney General for the plaintiff cited *Boraston*'s case, 3 *Co.* 20. and *Taylor* versus *Biddall*, 2 *Mod.* 289. LOVELL v. LOVELL.

Mr. *Brown* for the defendant cited 1 *Leon.* 101. and Mr. *Ford* of the same side cited *Idle* versus *Coke*, *Salk.* 620. (1), and *Cro. Jac.* 376.

LORD CHANCELLOR,

As this is the case of a copyhold, no other construction can be made, but what arises on that kind of conveyance.

As to the real intention of the surrenderor, it is pretty difficult to maintain what the plaintiff's counsel contend for, that though *Thomas* the infant was but four months old, the surrenderor intended to divest himself of the whole estate, and give it in such a manner, that notwithstanding the infant died the next day, [12] it would go to his heir though ever so remotely related to the surrenderor.

The surrender was never perfected, for in one respect the bill is brought for that purpose, and upon the circumstances of this case, there is no occasion to make a strain in favour of the plaintiff.

But be this as it will, the words as they now stand, and the legal effect of those words, must have their avail.

I will take it first upon the words abstracted from the memorandum.

It has been insisted on, that though *Thomas* the infant died at nine months old, yet the estate vested in him, and that it was a disposition of the inheritance to him immediately, and only a chattel interest in the uncle, till the infant might attain his age of twenty one, though he died at nine months old.

As to the cases cited, *Boraston*'s, and *Taylor* v. *Biddall*, they were both upon wills, in which there is great latitude of construction, to comply with the intention of a testator; and in *Boraston*'s the principal point (for it was not merely an auxiliary argument) was its being a computation by the testator for payment of debts, and *Taylor* versus *Biddall* is upon an executory devise; for I had a very particular reason to look into this case in *Stephens* versus *Stephens* (2), and therefore sent for the record out of the treasury: not truly stated in the report of the case, for the other point mentioned in the book could not arise, being determined merely upon an executory devise.

Surrenders of copyhold estates are to be construed as deeds and conveyances at common law, and not as a will; and as Mr. *Ford* said, *a springing use* in a copyhold estate would be construed as a springing use in a freehold (3).

If this had been a limitation by deed of an estate at common law, as *Thomas* died before twenty-one, it cannot be supported, that the estate to *William* should continue till *Thomas* might have attained his age of twenty-one.

(1) 1 *P. W.* 70. S.C.
(2) *Ca. temp. Talb.* 228. S. C.

(3) But copyhold estates are not within the statute of uses. *Rigden* v. *Vallier*, 2 *Vez.* 257.

If

LOVELL v LOVELL.

If limitations are so framed, as by the rules of law they are void, they must take their fate, and no intention can make them good.

To support a contingent remainder in a freehold, there must be a tenant of the freehold against whom a *præcipe* may be brought; otherwise as to a copyhold, for there no *præcipe* can be brought, being parcel of the manor only, and the freehold in the lord.

To be sure there is a difference between requiring an estate to support a contingent remainder in a freehold, and a copyhold, * because in the former there must be a tenant of the freehold against whom a *præcipe* may be brought, but copyhold lands are not held of the manor, but are parcel of the manor, and the freehold is in the lord, therefore no *præcipe* can be brought against the tenant of a copyhold.

[*13] But I know of no case, where there is a limitation of a copyhold in the manner it is here, that it has been construed to be good.

As to the indorsement.

This is no more than the declaration of the trust of the profits to *William* for *Thomas*, and not for payment of debts, or any other purpose.

I think this rather turns against the plaintiff, because it takes it out of the reason of *Boraston*'s case: for there the testator had made a computation that the profits would clear his debts by the time his son attained the age of twenty-one, and therefore notwithstanding he died before twenty-one, the court was of opinion, it ought to continue till he might have attained his age of twenty-one.

But here *William Lovell* could not be accountable to any heir of *Thomas Lovell*, for *William* by the memorandum is expressly directed to be accountable to *Thomas* only.

Therefore, as this differs from *Boraston*'s case, and as it is not upon the construction of a will, and as the surrender of copyhold estates is to have the same construction with feoffments at law, and other conveyances, therefore I must decree for the defendant, the heir at law of *William Lovell*, and dismiss the bill of the plaintiff, who is the brother and heir at law of *Thomas*, but without costs.

Case 7. *Lawton* versus *Lawton*, *December* 14, 1743.

A fire engine set up for the benefit of a colliery by a tenant for life, shall be considered as part of his personal estate, and go to the executor, for the increase of assets in favour of creditors.

THE material question in the cause was, whether a fire engine set up for the benefit of a colliery by a tenant for life, shall be considered as personal estate, and go to his executor, or fixed to the freehold, and go to a remainder-man.

There was evidence read for the plaintiff, a creditor of the tenant for life, to prove that the fire engine was worth, to be sold, three hundred and fifty pounds; and that it is customary

to

to remove them; and that in building of ſheds for ſecuring the engine, they leave holes for the ends of timber, to make it more commodious for removal, and that they are very capable of being carried from one place to another (1).

[14]

That the teſtator, the counſel for the plaintiff ſaid, was dead, greatly indebted, and it would be hard, when he has been laying out his creditors' money in erecting this engine, that they ſhould not have the benefit of it, but that the ſtrict rule of law ſhould take place.

Mr. *Wilbraham* compared it to the caſe of a cyder mill which is let in very deep into the ground, and is certainly fixed to the freehold; and yet Lord Chief Baron *Comyns*, at the aſſizes at *Worceſter*, upon an action of trover brought by the executor againſt the heir, was of opinion that it was perſonal eſtate, and directed the jury to find for the executor (2).

Evidence was produced on the part of the defendant, to ſhew that the engine cannot be removed without tearing up the ſoil, and deſtroying the brick work.

Mr. *Clark* of counſel for the defendant cited *Finch*, *fol.* 135. under the head of *Diſtreſs*: and the caſe of *Wortley Montague* v. *Sir James Clavering*, about two years ago before Lord *Hardwicke*.

LORD CHANCELLOR,

This is a demand by a creditor of Mr. *Lawton*, who ſet up the fire engine, to have the fund for payment of debts extended as much as poſſible.

It is true the court cannot conſtrue the fund for aſſets, further than the law allows, but they will do it to the utmoſt they can in favour of creditors.

This brings on the queſtion of the fire engine, whether it ſhall be conſidered as perſonal eſtate, and conſequently applied to the increaſe of aſſets for payment of debts.

Now it does appear in evidence, that in its own nature it is a perſonal moveable chattel, taken either in part, or in groſs, before it is put up.

But then it has been inſiſted, that fixing it in order to make it work, is properly *an annexation* to the freehold.

To be ſure, in the old caſes, they go a great way upon *the annexation* to the freehold, and ſo long ago as *Henry* the Seventh's time, the courts of law conſtrued even a copper and furnaces to be part of the freehold.

The old caſes go a great way upon the *annexation* to the freehold; but courts of late have relaxed this ſtrict conſtruction of law, to encourage tenants for life to do what is advantageous to the eſtate during their term.

Since that time, the general ground the courts have gone upon of relaxing this ſtrict conſtruction of law is, that it is for the

(1) It appears from the anſwer of *Robert Lawton* the remainder-man, that the tenant for life had erected a building, which was covered in: and that this building was merely for the uſe of the engine.

(2) This caſe in all probability turned upon a cuſtom. *Per Lord Mansfield* in *Lawton* v. *Lawton*, cited in the note at the end of this caſe of *Lawton* v. *Lawton*.

benefit

LAWTON v. LAWTON.

benefit of the publick to encourage tenants for life, to do what is advantageous to the estate during their term.

To remove wainscot fixed only by screws, and marble chimney pieces is not waste.

What would have been held to be waste in *Henry* the Seventh's time, as removing wainscot fixed only by screws, and marble chimney pieces, is now allowed to be done.

Landlords have no right to retain coppers and brewing vessels against a tenant, as they were laid for the convenience of trade.

Coppers and all sorts of brewing vessels, cannot possibly be used without being as much fixed as *fire engines*, and in brewhouses especially, pipes, must be laid through the walls, and supported by walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them.

This being the general rule, consider how the case stands as to the engine, which is now in question.

It is said, there are two maxims which are strong for the remainder-man: *First*, That you shall not destroy the principal thing, by taking away the accessory to it.

This is very true in general, bu does not hold in the present case, for the walls are not the principal thing, as they are only sheds to prevent any injury that might otherwise happen to it.

Secondly, It has been said, that it must be deemed part of the estate, because it cannot subsist without it.

Now collieries formerly might be enjoyed before the invention of engines, and therefore this is only a question of *majus* and *minus*, whether it is more or less convenient for the colliery.

There is no doubt but the case would be very clear as between landlord and tenant.

It is true, the old rules of law have indeed been relaxed chiefly between landlord and tenant, and not so frequently between an ancestor and heir at law, or tenant for life and remainder-man.

But even in these cases, it does admit the consideration of publick conveniency for determining the question.

I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir.

[16]

One reason that weighs with me is, its being a mixed case between enjoying the profits of the land, and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brewhouses, &c. of furnaces and coppers.

Tho' cyder is part of the profits of the real estate, it has been held that a cyder mill is personal notwithstanding, and shall go to the executor, and not the heir.

The case too of a cyder mill, between the executor and the heir, mentioned by Mr. *Wilbraham*, is extremely strong; for though cyder is part of the profits of the real estate, yet it was held by Lord Chief Baron *Comyns*, a very able common lawyer, that the cyder mill was personal estate notwithstanding, and that it should go to the executor.

It does not differ it in my opinion, whether a shed over such an engine be made of brick or wood, for it is only intended to cover it from the weather and other inconveniencies.

This

This is not the case between an ancestor and an heir, but an *intermediate* case, as Lord *Hobart* calls it, between a tenant for life and remainder-man. LAWTON v. LAWTON.

Which way does the reason of the thing weigh most, between a tenant for life and a remainder-man, and the personal representative of tenant for life, or between an ancestor and his heir, and the personal representative of the ancestor? Why, no doubt, in favour of the former, and comes near the case of a common tenant, where the good of the publick is the material consideration, which determines the court to construe these things personal estate; and is like the case of *emblements*, which shall go to the executor, and not to the heir or remainder-man, it being for the benefit of the kingdom, which is interested in the produce of corn, and other grain, and will not suffer them to go to the heir.

Emblements shall go to the executor, and not the remainder-man, the publick being interested in the produce of corn and other grain.

It is very well known, that little profit can be made of coal-mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up.

These reasons of publick benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion.

Reasons of publick benefit and convenience have great weight.

Upon the whole, I think this fire engine ought to be considered as part of the personal estate of Mr. *Lawton*, and go to the executor for the increase of assets; and decreed accordingly (1).

(1) *Reg. Lib. B.* 1743. fol. 1. There were certain other engines fixed upon salt works by the *father* of the tenant for life, the testator. These engines were decreed *not* to be the personal estate of the testator.

The old and general rule of law seems to be, that whatever is fixed to the freehold becomes part of it, and cannot be taken from it. *Co. Litt.* 53. *a.* *Bro Waste. pl.* 104. 143. *Cooke*'s case, *Moore* 177. *Herlakenden*'s case, 4 *Co.* 64. *a.* *Day* v. *Bisbitch*, *Cro. Eliz.* 374. *Cave* v. *Cave*, 2 *Vern.* 508. *Culling* v. *Tufnal*, *Bull. N. P.* 34. But of late years there have been two exceptions to this rule. The first is between landlord and tenant; the latter of whom may take away during the term all such chimney pieces, wainscot, &c. and all such things necessary for trade, as brewing vessels, coppers, fire engines, cyder mills, &c. as he has himself put up or erected. But such removal must be *within the term*, otherwise he will be considered as a trespasser. The second exception is between tenant for life or in tail and the reversioner or remainder man. The former may remove fire engines, cyder mills, coppers, &c. which he has erected, and by which he not only enjoys the profits of the estate, but carries on *a species of trade*. And if he does not remove them in his life-time, they go to his *executor*. The rule however still holds as between the *heir* and *executor*. *Poole*'s case, 1 *Salk.* 368. *Ex parte Quincy*, *ante* 1 vol. 477. *Dudley* v. *Warde*, *Amb.* 113. *Bull. N. P.* 34. S. C. cited. In *Lawton* v. *Lawton*, *B. R. Easter* 22 *Geo.* 3. An action of trover was brought by the plaintiffs as administrators of *Robert Lawton*, against the defendant for certain salt pans, which were put into wyche houses in *Cheshire*. The pans were brought in in pieces. The wyche houses are of no use without the pans, nor is the brine of any use without them. There was room for the workmen to walk round them within the building. The pans were fixed by brick and mortar to the floor of the building; and there was a furnace under it. The building had lodging rooms at the end

of it: which building with the pans let for 8 *l.* a week. The question was, whether these pans were to go to the *executor* or to the *heir*. The ancestor was seised in fee. Lord *Mansfield* delivered the opinion of the court. All the old cases (and there are some to be found in the year-books) lean in favour of the *heir*: and so rigidly, that if a tenant was to put up a wainscot or pictures let into the wainscot, &c. he could not take them away. There has been a relaxation of two species of property, the one between *landlord* and *tenant*, as marble chimney pieces and things, which are necessary for trade, &c.; and in the removal of these, there is no hurt to the landlord. The tenant says, I leave the premisses just as I found them. The other species in which there has been a relaxation is between tenant for life and the remainder-man as fire engines, &c. The tenant for life will not erect such things, unless they can go to his executor. But I cannot find any case (except that about the cyder mill, see *supra* 14.) where there has been any relaxation between the *heir* and *executor*. That case most probably turned upon a custom. Now consider the present case, which is very strong. A salt brine in the county of *Cheshire* is a most valuable inheritance. But there is no enjoying the inheritance without the buildings and salt pans. They are of no use but for that purpose, and the inheritance is of no value without them. To the executors they can be worth no more than old iron and old bricks, if taken away. Here the ancestor erected them at his own expence on his fee-simple. It is impossible, that he should mean them to be severed at his death; for they are worth nothing to an executor, and very valuable to the heir. It would have been a very different consideration, if this salt brine had been let to a tenant, who had erected these pans. There he might have said, I was at the expence of erecting them, and therefore my executor should have them; and I leave the estate as I received it. Therefore we are all of opinion they go to the *heir*. Judgment for the defendant.

[17]
Case 8. *December* 17, 1743. *Pleas and Demurrers.*

A plea to bill brought to set aside a will for fraud, and for appointing a receiver, allowed as to the first part, and disallowed as to the latter.

A Bill was brought to set aside a will for fraud, on suggestion the testator was incapable of making it, by being perpetually in liquor, and particularly when he executed the will, and likewise for a receiver to be appointed.

The defendant pleads the will was duly executed, and that it ought to prevail, till upon an issue at law it should be found to be otherwise, and that, as he was in possession under the will, a receiver ought not to be appointed till the validity of the will was determined.

LORD CHANCELLOR,

This court cannot set aside a will for fraud, for the due execution of it is triable at law only.

The plea must be allowed, for you cannot in this court set aside a will for fraud (1); but as to a receiver, I must disallow it, for I will not tie up the hands of the court, if in the progress of the cause it should be necessary to appoint a receiver (2).

(1) *Bennet* v. *Vade*, ante 2 vol. 324.

(2) *Vide Knight* v. *Duplessis*, 2 *Vef.* 360.

December 17, 1743. *Anonymous.* Case 9.

A Bill was brought for discovery of title deeds, and relief prayed likewise.

Where a bill prays relief as well as discovery, an affidavit must be annexed that the plaintiff has not the deeds in his custody.

The defendant demurred that upon the plaintiff's own shewing none of his ancestors have been in possession for the last forty years, that it was a matter triable at law, and that there was no affidavit annexed, that the plaintiff had not the deeds in his custody.

The Chancellor allowed it on the last cause upon the common course of the court, that where a bill prays relief, as well as discovery, an affidavit must be annexed that the plaintiff has not the deeds in his custody (1).

(1) So *Whitchurch* v. *Golding*, 2 *P. W.* 541. *Derne* v. *Fortescue*, *post.* 132.

Talbot v. *May*, *December* 17, 1743. Case 10.

THE bill was brought for tithes of a mill, and a plea of a *modus* of 6 *s.* 8 *d.* for the mill, when it was part a corn-mill, and part a fulling-mill.

Where the owner of an ancient mill and the house roof thinks proper to erect two new wheels, they are to be considered as two mills, and to a bill brought for the tithe, he cannot cover them with the same *modus* (1).

In 1719, the fulling wheels were taken away, and a pair of mill-stones put in the room, and has been ever since a corn mill. [18

Mr. Attorney General for the plaintiff.

It was anciently a fulling-mill, and the corn-mill and the fulling-mill is now under the same roof, and the *modus* cannot extend to cover a new erected mill, for as it is altered to a corn-mill it must pay tithe in kind.

Mr. *Hamet* of the same cited 1 *Roll's Abr.* 632. 3 *Bulstr.* 312. 1 *Brownl.* 32. *Cro. Jac.* 523, and the case of *Nut* v. *Chamberlain*, heard first in the exchequer, and afterwards in the house of Lords, where it was determined that every water corn-mill, must pay corn as a personal tithe.

Mr. *Talbot* of the same side cited 1 *Roll's Abr.* 656.

The counsel for the defendant insisted that the *modus* covers the mill, let the engine of the inside consist of wheels or of stones, and therefore changing the working part makes no variation, but the *modus* will still cover it as a mill, though of a different kind.

(1) See *Grimley* v. *Faulkingham*, 4 *Mod.* 45.

TALBOT v. MAY.

They cited 1 *Roll's Abr.* 641, and 2 *Inst.* 490. That adding new stones to ancient mills will not alter the *modus*, nor destroy it, where the stones are under the some roof: they cited *Carth.* 215.

LORD CHANCELLOR,

The plea in this case must be considered both in respect to the form and substance, and upon either it cannot stand, for as it is not *ad idem*, it is impossible to know to what it is applicable.

Here are three mills charged by the bill to be working mills: the defendant pleads a *modus* to one only called *Birdlip* mill.

All of them at present are used as corn mills, and therefore the plea is quite uncertain, if this point could be laid aside, which I cannot do, consider it next upon the substance.

I will consider them as two new corn mills, but under the same roof.

Suppose first an ancient mill under a building worked with one wheel, and the owner under the same roof think proper to erect two new wheels, and two new stones, I am of opinion this is to all intents and purposes two mills, and he cannot cover them with the same *modus*; you might as well say he might erect another mill upon the same stream, and call it one mill.

[19]

Where there are two ancient corn mills in the same parish which paid tithes, and another miller who had a fulling mill covered with a *modus*, turned it into a corn mill, the mill so converted shall pay tithe.

Suppose two ancient mills in the same parish which paid tithes in kind, and another miller who had a fulling mill covered with a *modus* should turn it into a corn mill, it would prejudice the parson in the other mills, as the new erected one would diminish the trade of those mills, and the parson suffering by those means ought to be recompensed by the payment of tithe for the mill so converted.

The reason the cases go upon, why a *modus* is destroyed where two stones are erected instead of one, is, because the miller can grind a double quantity.

Where two fulling mills and a corn mill were under the same roof, and the fulling mills are turned into two new corn mills, they are become two new mills.

Consider it in another light, formerly there were two fulling-mills, and a corn mill under the same roof, and the fulling-mills now turned into two new corn mills, this is just the same thing as if he had erected two new mills.

A fulling mill being in the nature of a trade, pays only a personal tithe.

The fulling mills can only pay a personal tithe, because it is only in the nature of a trade, but where there are corn mills, each is to pay a tenth dish.

In this case, thus much must be shewn, that there was a custom in this parish for fulling-mills to pay tithes, or otherwise they do not properly pay them.

The only colourable thing is, it was an ancient *modus* for the land, and that the mill is but an accidental quality.

But it is not pleaded for the land only, but as a conjunct *modus* both for land and mill too, and therefore let the plea be over-ruled.

The Last Seal before Christmas 1743. Case 11.

WITH regard to taking exceptions to answers, I have laid down this rule to myself, that if an answer comes in, in *Michaelmas* term, and the plaintiff does not take exceptions within eight days of *Hilary* term, upon applying to the court, he is of course intitled to take exceptions, provided he does it within two terms, the term in which he moves it inclusive; and if he neglects to do it then, the court will not give leave but upon particular circumstances.

If in *Michaelmas* term an answer comes in, and the plaintiff does not take exceptions within eight days of *Hilary* term after, yet on applying to the court, he is intitled to take exceptions, provided he does it within two terms, the term in which he moves inclusive.

Bond versus *Simmons*, *January* 21, 1743, *among the Petitions in Causes*. [20] Case 12.

THE defendant was executor under the will of a person who had left a legacy of 500 *l.* to the petitioner Mrs. *Bond* before her marriage with her late husband, who notwithstanding he had received at different times, at least 2000 *l.* from other parts of his wife's fortune, never could be prevailed upon to make any settlement or provision for the wife; upon which the defendant, the uncle of Mrs. *Bond*, refused to pay the legacy into his hands; and the husband, about the year 1734, brought a bill for the legacy: the court referred it to a Master to receive proposals from the husband for a provision for the wife; the Master certified the husband had never laid any proposals before him; upon which, on the petition of the defendant to be eased of the burden of this demand, the court on his offering to pay in the money, directed the Accountant General to lay it out in *South-sea* annuities for the benefit of the husband and wife, subject to the further directions of the court.

So much of a former order as directed the payment of the sum of 122 *l.* 15 *s.* 7 *d* to the executor of the husband must be discharged, and the same ought to be paid to the petitioner.

The dividends and produce of the annuities amounting now to 122 *l.* 15 *s.* 7 *d.* the husband being dead, his executor insisted, that though it was a *chose in action* of the wife's, yet by the decree, and the order on the Accountant General to lay it out as aforesaid, the property vested in the husband (1), and he was intitled to the principal, and likewise to the interest made of the annuities; in consideration of his maintaining his wife in the mean time.

Upon a petition to the *Master of the Rolls*, he was of opinion for the wife as to the principal, but thought the representative of the husband intitled to the dividends, and ordered it accordingly.

(1) *Vide* the cases cited in *Lanoy* v. *Athol*, *ante* 2 vol. 448.

Bond v. Simmons.

It came on now before the Chancellor in nature of an appeal from the order of the *Master of the Rolls*, in which the plaintiff *Margaret Bond* preferred her petition to the Lord Chancellor, praying that so much of the order of the 29th of *November* 1743, as directs the payment of the sum of 122 *l.* 15 *s.* 7 *d.* to *John Bond*, may be discharged, and that the same may be paid to the petitioner.

LORD CHANCELLOR,

Had the legacy been the only portion of the wife, the husband would have been intitled to the interest for the maintenance.

If this five hundred pounds had been the only portion of the wife, I should have been of opinion the husband in his life-time would have been intitled to the interest for her maintenance, but the wife has brought him a considerable portion besides, no less than two thousand pounds, as appears by affidavits.

[*21]

*The husband has used her so hardly, that he has left her nothing but only her own freehold estate, which he could not debar her of.

Where a husband recovers a judgment for the wife's debt, and dies before execution, she is intitled, and not his executor.

Suppose at law a husband had recovered a judgment for a debt of the wife, and had died before execution, the wife would have been intitled, and not the husband's executor.

Here the husband was so obstinate he would not perform the terms of the decree by making a settlement, so that upon application to the court they ordered the money to be put out by the trustees for the benefit of the husband and wife, subject to the further order of the court, without saying any thing of the application of this money.

Where a husband has received a great part of a wife's portion, and refuses to make a settlement, the court will not only stop the payment of the residue of her fortune to him, but will prevent his receiving the interest of that residue, that it may accumulate for her benefit.

Suppose where a husband has received a great part of a wife's portion, and only a small part remains, and the husband is so perverse he will not make a competent settlement on the wife, the court will not only stop the payment of the residue of her fortune to the husband, but will even prevent his receiving the interest of that residue, that it may accumulate, for the benefit of the wife, unless he is starving for want of maintenance.

The direction here was not for the benefit of the husband, or to alter the right and property of the parties, but only to ease the executor of the burden, and ordering the Accountant General to lay it out in this manner was to secure it against the husband, subject to the further order of the court.

Lord Chancellor directed that so much of the order of the 29th of *November* as directs the payment of the sum of 122 *l.* 15 *s.* 7 *d.* to *John Bond*, may be discharged, and the same be paid to the petitioner (1).

(1) *Reg. Lib. A.* 1743. fol. 92. a. *Vide Anon. post* 726.

Coulson versus *White*, *January* 26, 1743. Case 13.

LORD CHANCELLOR,

EVERY common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nusance, in such a case the court will interfere and grant an injunction to restrain the person from committing it.

This court will not grant an injunction to restrain a person from committing a trespass, where it is temporary only; otherwise where it has continued so long as to become a nusance.

Woodhouse versus *Hoskins*, *January* 31, 1743. Case 14.

Lord *Hardwicke* of opinion this was not such a case as would induce the court to decree a trustee to join in a recovery, and dismissed the bill brought by the creditors against the heir at law of the surviving trustee to compel her to join.

SIR *John Hoskins* by will, dated the 3d of *September*, 1697, devised his lands, after the death of his wife and a trust-term of 1000 years, to his son *Bennet Hoskins* for 99 years, if he should so long live, without impeachment of waste, remainder to two trustees and their heirs during the life of his son *Bennet* to preserve contingent remainders, remainder to the first and other sons of *Bennet* in tail male, remainder to *Hungerford Hoskins* his second son for 99 years, if he should so long live, remainder to the same trustees and their heirs during the life of *Hungerford Hoskins* to preserve contingent remainders, remainder to his first and every other sons, remainder to his other sons in like manner, remainder to Sir *John Hoskins*'s daughters, remainder to the testator's heirs.

There was a power for the sons, when in possession, to make jointures and leases, except as to particular lands, and another power for *Bennet* and the other sons within two years after being in possession, and having a son of the age of 18, to revoke all and every the former uses, and to limit new uses, so that the premisses be limited to the heirs male of the sons in the same manner as these limitations, and to settle such like power of revocation.

Sir *John Hoskins* died.

Bennet Hoskins his eldest son died without issue.

Hungerford Hoskins the second son, now Sir *Hungerford Hoskings*, married, and has a son *Chandos Hoskins*, now above twenty-one.

Sir *Hungerford* and his son became indebted by bonds to creditors, and made assignments of the settled estate in trust for creditors, and agreed to suffer a common recovery to make the assignment and provision for the creditors effectual.

The bill is brought by the creditors against Sir *Hungerford Hoskins* and his son *Chandos*, and against *Thomas Hoskins* (the fifth son of Sir *John Hopkins*) all the other sons, who had intermediate remainders as before, being dead without issue, and against the defendant Mrs. *Ann Berrington* the heir of the sur-

WOODHOUSE v. HOSKINS.

viving truftee, to preferve contingent remainders, in order to compel her to join in a common recovery, and that the plaintiffs might have an effectual fecurity and fatisfaction for their debts.

Mr. Attorney General for the plaintiffs.

[23] There are two general queftions; The firft as to the compelling the defendant Mrs. *Berrington* the truftee to join in a conveyance to make a tenant to the *præcipe*, in order to fuffer a recovery.

Secondly, As to the power of revocation, Whether that be not a perpetuity, and void?

Mrs. *Berrington* is a truftee for the fon of Sir *Hungerford Hofkins*, who is tenant in tail vefted, and if fhe had joined voluntarily, it would not have been a breach of truft; and for this purpofe cited 2 *Vern.* 754.

Mr. *Wilbraham* of the fame fide cited 1 *Wms.* 358 (1) *Eq. Caf. Abr.* 386. *Foley* v. *Winnington* (2), decreed by Lord *Macclesfield*, that the truftees to preferve contingent remainders fhould join.

Lord *Chancellor* faid he was of counfel in the cafe, and it was to make a marriage fettlement, and fo to continue the ufes in effect of the old fettlement, and after the ufes of the new marriage fettlement were ferved, it went to the old ufes.

Mr. *Biddulph* for Mr. *Thomas Hofkins* the remainder-man faid, there was no precedent where a court of equity have decreed *the truftees to preferve contingent remainders* to join in deftroying remainders, unlefs to make a new fettlement, as in *Winnington*'s cafe, but here the prayer is to fell and alienate the eftate, and the debts are recited in the articles to be the debts of the father, and for which the fon is only fecurity.

Mr. Attorney General in reply faid, the fon is fo far owner of the eftate as that he may levy a fine, which will create a bafe fee, and bind fo long as iffue of him fhall exift, and may raife money though not fo conveniently, and upon fuch eafy terms, as if the whole were in his power.

As to the debts being the father's, the fon is equally bound, and in refpect to the obligee he is as much a debtor as the father, and cited 1 *P. Wms.* 536.

[24] LORD CHANCELLOR,

Where the intent of the owner of an eftate appears to preferve the limitations he has made of it as far as poffible, the court will effectuate this intent, where the ufes are executory.

If this had turned upon the power, I fhould not have determined it now, but in a more folemn manner; but as there is a previous queftion as to compelling the truftees to join in a common recovery, the other point is not now neceffary to determine, yet fo much may be drawn from the power, as may fhew the intent of Sir *John Hofkins* to preferve the limitation he had made as far as poffible, and this intent the court effectuates where the ufes are executory, as where Lord *Cowper* directed truftees to preferve contingent remainders to be inferted in the cafe of Sir *John Maynard*'s will.

(1) *Baffet* v. *Chapman*, S. C. (2) 1 *P. W.* 536. S. C.

It

It is agreed there is no precedent where the court have decreed in such cases the trustees to join; and I am of opinion, this is not such a case, where the court ought to decree it (1).

WOODHOUSE v. HOSKINS.

Trustees of this kind are called Honorary Trustees, and intrusted by parties to preserve the contingent remainders; but I will not say, if the trustee who is appointed should join, it would be such a breach of trust, as this court would decree a satisfaction.

The court would not declare, whether the trustees joining would have been liable to make satisfaction for such a breach of trust.

The reason of making the father a tenant for 99 years, is in order to preserve the estate; it may likewise be the design of such settlements to prevent the father's influence over the son when of age, if the father was seised of the freehold, to get the son to destroy the settlement.

Making the father tenant for 99 years, instead of giving him the freehold, is to prevent his having such an influence over the son when of age, as to draw him in to destroy the settlement.

Here the intention is to pay the debts of the father.

The objection is, the trustee is trustee for the first tenant in tail, and that when the tenant in tail is seised of the freehold, then he has a power to bar, and not before.

As to the cases there are but few; Mr. *Winnington*'s went upon the reasons before mentioned, for the letting in the jointure, and a provision for younger children, which was still carrying it on in the family.

The argument made use of by the plaintiff's counsel was that here it is prayed to execute the trust of articles, and to be sure, it is true, but this court is not to decree every trust created by the parties; and though, as has been said before, the court might not condemn the trustee if he consented; yet it does not follow that the court will compel the trustee, and I think *this* the very case which was intended to be prevented by the trust, wherefore the bill must be dismissed. *Townsend* versus *Lawton*, 2 *P. Wms.* 379. was mentioned by Lord *Hardwicke* in support of his opinion.* [25]

(1) *Symance* v. *Tatton*, *ante*, 1 vol. 613. *Barnard* v. *Large*, *Amb.* 773. 1 *Bro. Cha. Rep.* 534.

* On marriage, lands are settled to *A.* for 99 years, if he so long live, remainder to *B.* and his heirs during the life of *A.* to support contingent remainders, remainder to the first and every other son of *A.* *A.* has two sons, *C.* and *D.* *A.* the father having mortgaged the premisses, he and his son covenant to suffer a recovery, and to procure *B.* the trustee to join: *B.* the trustee by answer, submits to the court: The court will not compel the trustee to join, unless *D.* the second son of the marriage will consent. *Townshend* versus *Lawton*, 2 *P. Wms.* 379.

Case 15. *Webb* versus *Litcot*, *February* 7, 1743.

On a bill brought to establish a will against an heir at law, the court, notwithstanding he made default, ordered the proofs of it to be read, and said the will could not be otherwise well proved.

A Bill was brought against several persons, and the heir at law, to establish a will; the heir at law makes a default.

LORD CHANCELLOR,

I have some doubt, whether I ought not to hear proofs of the will's being duly proved, before I can declare it well proved, notwithstanding the defendant, *the heir*, has made default; though in common cases the plaintiffs are intitled to a decree according to the prayer of their bill, without reading any evidence, yet he thought he could not regularly declare the will well proved, unless he read to the proof of it.

The register could not recollect any case where this was the practice of the court, but Lord Chancellor thinking it necessary, ordered the proofs of the will to be read (1)

(1) Vide *French* v. *Baron*, *ante*, 2 vol. 120.

[26]
Case 16.

February 8, 1743, *John Norris an Infant*, *Ann Norris*, *John Monk*, *Elizabeth Le Leve*, *and Others*, — — Plaintiffs.

Isabella Le Neve, *Spinster*, *Edward Le Neve*, *Esq*; *Petre Le Neve*, *Gent. Son and Heir of Henrietta Le Neve*, *deceased*, *Edward Matthew Grave Gent. and Ann his Wife*, *the Daughter and Heir of Ann Rogers deceased*, *formerly Ann Le Neve*, *which said Isabella*, *Henrietta*, *and Ann Rogers*, *were the Daughters aud Co-heirs of Oliver Neve*, *otherwise Le Neve*, *Esq*; *deceased*, — Defendants.

S. C. post. 82. Semb.

Lord Bacon's rules in respect to bills of review, having never been departed from since the making of them the court was of opinion that the parties who now applied for leave to bring such a bill, had not brought themselves within those rules, and dismissed the petition.

OLIVER *Le Neve*, of *Great Witchingham*, in the county of *Norfolk*, Esq; being seised in fee of divers manors, lands, &c. in *Norfolk*, *Surrey*, *Middlesex* and *London*, of the yearly value of 1500 *l.* and having no child, and a great desire to continue his estate in his name and blood, did propose to settle the same upon *Oliver Le Neve*, then an infant of ten years of age (father of the defendant *Isabella*, and grandfather of the defendant *Peter Le Neve*, and *Ann Grave*) and upon *Peter de Neve* his brother, also an infant of twelve years of age, and *Francis de Neve*, and their issue.

Old *Oliver Le Neve* had been long acquainted with one *John Norris* a barrister at law, residing in the county of *Norfolk*, (great grandfather of the plaintiff *John Norris*) who had been his standing counsel for many years, and had the sole direction

of his affairs, and *Oliver* intirely relied on his skill and integrity in preparing such settlement. NORRIS v. LE NEVE.

On the 7th and 8th of *February* 1674, old *Oliver Le Neve* did by lease and release (in consideration of the natural love and affection he bore to *Oliver Neve*, *Peter Neve*, and *Frances Neve*, being his cousins and of his name and blood, and for making provision for payment of his debts and legacies, as he should by his last will appoint) convey and limit the said manors, lands, *&c.*

To the use of himself for life, without impeachment of waste.

To the use of *Elizabeth* his wife for life, as to part.

Remainder, as to the whole, to his cousin *Oliver Neve* for [27]
99 years, if he so long live.

Remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder in like manner to *Peter Neve*, and *Francis Neve*, and to their first and other sons in tail male.

Remainder *to the right heirs of the said* Oliver *the grantor*.

In the indenture was a proviso that it should be lawful for *old Oliver* by his will, to limit all the said estates, after his own death to any person for any term of years, in order to raise money for the payment of his debts and legacies.

And on the 9th of *February* 1674, he made his will, and thereby in pursuance of the said power devised unto *John Norris* all the said estate for the term of ten years, to commence after the death of the testator, upon trust, that the rents and profits thereof should be applied in payment of his debts, legacies, and funeral expences, and after payment thereof, the surplus to *Oliver Neve* the infant, if then living; or in case of his death to *Peter*, if then living; and in case of his death to *Francis*, if then living, his executors, administrators and assigns, and made *John Norris* executor of his will, and gave him a legacy of 300 *l.*

Old *Oliver Le Neve* by a codicil dated the 17th of *January* 1678, willed that all houses and lands purchased by him since the making his will, should go to the same uses, and for the same estate, as were limited by his will.

Some few days after making the codicil, old *Oliver* died without issue, and *John Norris* proved the will, and entered upon the estates devised to him in trust as aforesaid.

On the 3d of *April*, 1679, old *John Norris* wrote a letter to *Francis Neve*, father of *Oliver* the infant, " Declaring a great " concern for the safety of the will, and that he would not " trust the same out of his hands, till he came to *London* " which he intended soon to do for the proving it in chancery, " and that he should be assistful to do therein for its best se- " curity to all intents, and assured the said *Francis*, he should, " to his best judgment, endeavour to have the intent of his " testator performed for all its purposes, so far as laid in him; " the trust thereof being committed to him so wholly, which

" he

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[28]

" he said obliged all his care and skill therein, which he de-" clared he was not a little solicitous to effect to his utmost, " and in which he was ready to comply, with the best ad-" vice he could take, to secure the ends the testator designed " by his will."

On the 2d of *August* 1769, old *John Norris* agrees with *John Neve* of *London*, blacksmith, the heir of the testator, for the purchase of the reversion in fee, after all the intermediate estates were spent, for thirty pounds, and by lease and release of the 1st and 2d of *August*, 1679, the blacksmith conveys to *John Norris* and his heirs all the said estate, late belonging to the said testator.

On the 23d of *October*, 1679, a bill in chancery was exhibited by the said *Oliver Neve* an infant by his guardian, and old *John Norris* against *Elizabeth Neve* (the testator's widow) and the blacksmith as heir at law to the testator, setting forth the settlement, bill and codicil, praying that the defendants might set forth what right they claimed in the said premisses, and that the plaintiffs might examine witnesses, and that their testimony might be preserved.

In *December* following the blacksmith's answer was put in, by which he insisted he was heir at law of *Oliver* the testator, and said that he had been informed that the said *Oliver* had intailed part of his estate, but that he had never seen the said settlement or will, and in the answer he neither took notice of old *John Norris*, having purchased the reversion of him, nor did he claim the said reversion.

Elizabeth Neve (the widow of *Oliver*) in *January* following put in her answer, insisted on her estate for life, and said she had no knowledge whatever of *John Neve* the blacksmith.

In the month of *January* 1679, the witnesses to prove the settlement were examined, to preserve their testimony.

The father of young *Oliver* died in *November* 1681.

And in *June* 1683, young *Oliver* having attained his age of 21, old *John Norris* settled all accounts with him, and at his request agreed to assign to him the remainder of the 10 years term (of which five years were then to come) and to put him into possession of the estate upon a release of these rents, *&c*, and of the trusts wherewith old *John Norris* stood charged by the settlement, and will, and such assignment and release were executed accordingly on the 2d of *October*, 1683.

Soon after this a dispute arose between young *Oliver Neve*, and old *John Norris*, about the testator's leasehold estate; and in *Easter* term 1684, young *Oliver Neve* files a bill against old *John Norris*, and therein charges that the said *John Norris* had renewed several leases, and that he had possessed all the deeds,

[29]

&c. relating to testator's real and personal estate, and prayed that the said *John Norris* might convey to him the said *Oliver* all the said freehold estate, as also the several terms, *&c.* of old *Oliver Le Neve*, of, or in any manor, lands, *&c.* wherein he was any ways intitled to at the time of his death, *and since*

come

come in any manner or by any means to the said John Norris, *or to his use or benefit.* NORRIS v. LE NEVE.

Old *John Norris* put in an anſwer the 22d of *July*, 1684, and thereby admitted that he drew and adviſed the ſettlement, will, and codicil, and that *Oliver*, the maker thereof, was governed by his advice in the conduct of this affair, and that he had been executor of all the wills by him made for twenty years before his death, ſaid that he had delivered up all the deeds and writings belonging to the teſtator's eſtates, but yet took no notice of the purchaſe he had made of the blackſmith, *although he was required by the ſaid bill to ſet forth all intereſt which had come to him in any manner, as well leaſehold as freehold, in order to aſſign the ſame to young* Oliver Neve the plaintiff.

No further proceedings were had on that bill, but *Oliver Neve* and *John Norris* compromiſed the matter between them, and fourteen years afterwards, on the 10th of *Auguſt*, 1698, old *John Norris* aſſigned the ſaid leaſehold premiſſes to two perſons for the remainder of the term, which perſons declared themſelves truſtees for *Oliver Neve* the younger.

May the 1ſt, 1688. In purſuance of an agreement with *Peter Le Neve* (the elder brother of *Oliver*, and who was next in remainder after him, with a limitation to the iſſue male of his body) the blackſmith for ten pounds conveyed his reverſionary intereſt to the ſaid *Peter Neve* and his heirs, and died in *Auguſt* following.

On the 1ſt of *Auguſt*, 1701, old *John Norris* died, having firſt made his will, whereby he deviſed the reverſion he purchaſed of the blackſmith to his eldeſt ſon *John* (the preſent plaintiff's grandfather) for life, with remainder to his firſt and other ſons in tail male, with remainders over.

On the 7th of *December*, 1708, *Francis Neve*, the third and laſt perſon in the entail under old *Oliver Neve*'s ſettlement, died without iſſue.

In 1709 young *Oliver Neve* being in poſſeſſion of the eſtates, and but having one ſon living, an infant of ſo infirm a ſtate of health, that it was apprehended he could not live to be 21; and *Oliver* being not likely to have any more children, and *Peter* having no child, applied himſelf to the plaintiff's grandfather, who was in great want of money, and offered him 2000 *l.* and afterwards 3000 *l.* to deliver up the conveyance to his father from the blackſmith, but the reverſion being deviſed to him only for his life, he could not diſpoſe of it. [30]

Young *Oliver Neve*'s ſon being between 20 and 21, and very infirm, and his father not being able to purchaſe the reverſion, they came up to *London*, in order to get a privy ſeal to enable the ſon, notwithſtanding his minority, to ſuffer a recovery, but the plaintiff's grandfather entered a caveat at the proper office, which put a ſtop to it.

Soon after their return into the country, the ſon died before the age of 21.

On

Norris v. Le Neve. On the 26th of *November*, 1711, young *Oliver Neve* died without issue male, and his brother *Peter Neve* entered into possession, and applied to Mrs. *Earl* (a friend of the *Norris's*) and told her, he was desirous of purchasing Mr. *Norris's* reversion in this estate, and would give 5000 *l.* for it, and upon her saying she thought it not a valuable consideration; he said he would give more, and desired her to speak to him, which she did; and *Norris's* answer was, he had not power to sell it.

On the 11th of *January*, 1716, *John Norris*, the plaintiff's grandfather, died, leaving *John Norris* his only son and heir at law.

In, 1725, *Peter Neve* (being 64 years old) pretended he had some claim to the reversion, and, to accomodate disputes, proposed to marry a sister of the plaintiff's father, and, on these terms would yield up his claim to the reversion in fee: a meeting was had; but the provision he offered for the young lady being thought not sufficient, the matter broke off.

On the 1st of *October*, 1729, *Peter Neve* died without issue, having first made his will, and devised the estate in question, the reversion of which he had purchased of the blacksmith, to the three daughters of his late brother *Oliver Neve*; namely, *Isabella Le Neve*, *Ann Rogers*, and *Henrietta Neve*, and their heirs and assigns.

All the limitations in the first settlement being spent, upon the death of *Peter Neve* without issue, the reversion in fee became vested in *John Norris*, the plaintiff's father, who being then an infant, brought his bill *April* the 15th, 1730, against *Isabella Neve*, *Edward Neve*, and *Henrietta* his then wife, and *John Rogers* and *Anne* his wife, praying they may set forth what right they claimed to the estate, and to deliver up possession, &c. no answer was put in to this bill.

[31] In *Easter* term, 1731, the plaintiff's father brought ejectments for the lands in *Norfolk*, to which the defendants to the last mentioned bill appeared, and upon a long trial by a special jury at the summer assizes 1731, and full defence made, a verdict was given for the plaintiff's father for all the freehold lands in *Norfolk*, and judgment being entered, the defendants brought a writ of error.

On the 29th of *November*, 1731, the defendants brought a cross bill against the present plaintiff's father, and among other things charged that *Peter Neve* did not suspect that *Norris* had purchased the reversion, and that *Norris*, who was privy to *Peter's* purchase, never intimated that any conveyance had been made to him, but always declared himself to be no other than executor in trust, without setting up any claim to the reversion, and therefore prayed a discovery of all the deeds and writings, and that they might be delivered up and the conveyance to *Peter Neve* from the blacksmith be established, and that to *Norris* cancelled, and that the proceedings on the ejectment might be stayed.

In

In *Michaelmas* term, 1731, the plaintiff's father delivered ejectments for the *London* and *Southwark* estates, but on the 2d of *March*, 1731, the parties came to an agreement, that the copyhold and leasehold, which lie intermixed with the freehold, should be distinguished, that the plaintiff's father should, without trial, be let into possession of all the freeholds in *London*, *Southwark*, and *Norfolk*, comprised in the blacksmith's title.

John Rogers and *Ann* his wife died soon after, leaving issue the defendant *Ann*, now wife of *Matthew Grave*, and *Henrietta*, wife of the defendant *Edward Neve*, died, leaving issue the defendant *Peter* and the plaintiff *Elizabeth*.

The 7th of *October*, 1735, *John Norris*, the plaintiff's father, died, leaving the plaintiff his only son and heir, who, in *November*, 1740, filed his bill of supplement and revivor against the defendants, praying they might set forth whether they insisted on any and what title to the estate in question, that there might be a commission of partition of copyhold from freehold, that the plaintiff might be let into possession of the freehold, that he might have the benefit of the agreement in the former cause; and all deeds and writings to be delivered, and to be quieted in possession.

On the 2d of *July*, 1741, the defendants put in their answer, and insisted that old *John Norris* concealed his conveyance from the *Neves*; that his taking it was a breach of trust, and that he ought to be deemed a trustee for *Peter* and his heirs; admit the agreement in the former cause, but say it was not intended to bind the interest of any of the parties, that they ought not to account for the rents, &c. of the estate, but that the plaintiff's great grandfather, old *John Norris*, should be decreed a trustee for them, and the plaintiff obliged to account with them for rents and profits. [32]

The plaintiff replied to the answer, and issue being joined, examined divers witnesses, but the defendants (who had made the abovementioned defence agreeable to what they had collected from the common report in the family) did not examine any, being unable to prove the matter by them put in issue.

On the 17th of *July*, 1742, Lord Chancellor decreed an account of the profits of the freehold premisses since the death of *Peter Neve*, and declared the plaintiff intitled thereto, and directed a commission for dividing copyholds from freehold lands, and that after the execution of such commission, the writings belonging to the freeholds should be delivered up for the plaintiff's benefit.

On the 24th of *August*, 1742, the estates were distinguished and set out by metes and bounds.

On the 7th of *February* the cause was set down for further directions; but, before the same came on, the defendant *Ann* (late *Rogers*) married the defendant *Matthew Grave* an attorney.

On the 21st of *May*, 1743, the defendants petitioned for leave to file a bill of review, upon a suggestion that the petitioners

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tioners had since the decree discovered, that they were the heirs at law to the blacksmith, which they had never heard before, and that he was dead without issue.

On the 22d of *October*, 1743, the petition stood in the paper, but the defendants did not think proper to support that petition, but suffered it to be dismissed with costs.

On the 27th of *October* the defendants preferred a second petition for liberty to bring a bill in the nature of a bill of review, and to rehear the cause, on a suggestion, that since the decree was pronounced, they had discovered several facts by which the real truth of the case appeared, sufficient to shew that the purchase of the reversion by old *John Norris*, a trustee for *Oliver*, and during his infancy, ought to be esteemed a trust for him, and that they had discovered several deeds, witnessed by old *Norris*, relating to purchases by old *Oliver*, and several letters, manifesting the confidence old *Oliver* placed in him, and likewise the letter of the 3d of *April* 1679, and the record of the bill in Chancery on the 23d of *October*, 1679, brought by old *John Norris* and young *Oliver Neve* against the widow of old *Oliver Neve*, and the blacksmith, and likewise the records of the bill brought by *Oliver Neve* the younger against [33] old *John Norris* in *May* 1684, and several deeds before mentioned.

In support of the petition *William Havers* swore, he was the solicitor for the defendants *Isabella Neve, &c.* and that he did not know till after the 17th of *July* 1742, the day on which the cause was heard, that the defendants could prove that old *John Norris* was the counsel usually employed by old *Oliver Neve*, in his affairs; or that he had been his executor under many wills before his death.

Or that old *John Norris* did advise or draw the settlement and will of 1674.

Or that the estate in question was purchased by old *John Norris*, whilst he was in possession of the said estate in trust for young *Oliver Neve*.

Or that old *John Norris* had surrendred a lease of the personal estate, or that there had been any controversy about it, or that old *John Norris* had assigned the same in consideration thereof.

Or that old *John Norris* was a witness to any deeds wherein old *Oliver Neve* was a party.

The defendant *Mathew Grave* by his affidavit swore, that since the said cause was heard, *Thomas Martin*, executor of *Peter Neve*, delivered the settlement of 1674 to him, and that observing a cause indorsed on the settlement, he searched for the same, and found two causes in the Six Clerks Office, *Neve* versus *Neve*, and *Neve* versus *Norris*, in the records in the *Tower*: that he found the latter of the third of *April* 1679, in *Thomas Martin*'s custody the 10th of *July* last, and the lease granted to old *Norris*, and the assignment thereof in *Holden*'s custody, and also found the deeds attested by *Norris* in *Martins*'s custody.

The

The defendants *Isabella Neve*, *Edward Neve*, *Peter Neve*, and *Ann Grave*, in their affidavits swore, that they knew none of these facts till informed thereof by the defendant *Matthew Grave*, and that they examined no witnesses nor read any evidence in the cause, because they did not then know any of the facts.

Thomas Martin in his affidavit swore, that he is one of the executors of *Peter Neve*, who died in 1729, and that upon his death he found in his study the settlement and copy of old *Olives Neve*'s will, and the indenture of *October* 1683, and that the deeds and writings remained in his custody from 1729, till the delivery thereof to *Matthew Grave*, *&c.* on the 27th of *May* last.

That he was concerned in the country as attorney for the defendants, at the trial of the ejectment in 1731, but was not concerned as solicitor upon the defence for them in equity, and to his knowledge did never see the bill of revivor in this cause, nor the defendant's answers, but that he hath had meetings with the plaintiff's father, and may have talked with or acted for *Isabella Neve*, *Edward Neve* and his wife, and *John Rogers* and his wife, under the direction of the parties, or with Mr. *Havers* or Mr. *Bowyer*, the clerk in court, which *Havers* and *Bowyer* he believes had the sole conduct of the cause for the defendants: but he was not concerned for them as solicitor other than as aforesaid. [34]

This petition was heard before Lord *Chancellor* on the 28th of *January*, and on *February* the 4th and 8th, 1743, and in answer to this evidence, which was produced by the defendants in support of their petition, it was insisted on the part of the plaintiff, that the matters now pretended to be new discoveries by the defendants, are not so; for that at the trial of the ejectment in 1731, copies of the bill and answer in the cause of *Oliver Neve* and *John Norris* plaintiffs, *versus John Neve* and *Elizabeth Neve* defendants, were produced and read at that trial, and that *Thomas Martin* was the attorney employed by the defendants in that cause, and acted as such at the trial: and, as agent for the defendants, he wrote letters touching the executing the commission for examining witnesses in *May* 1732.

That the defendants exhibited their cross bill in 1731 against the plaintiff's father, and therein stated "the settlement and "will of old *Oliver Neve*, and of old *John Norris*'s having in-"structions to purchase the reversion for *Peter Neve*, and that "instead thereof he had purchased it fraudulently for himself, "and concealed such purchase and that therefore he ought in "equity to be deemed a trustee for the plaintiffs in the cross "bill."

It was likewise insisted, that the letter of the 3d of *April* 1679, or the deeds attested by old *John Norris*, are no new discoveries, because they came out of the hands of *Martin*, the defendant's attorney in the ejectment, and employed in the commission that issued in the cause out of Chancery.

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After reading the settlement and will in 1674, the blacksmith's conveyance, and the bill, answers and depositions in 1679, and 1684, and several purchase deeds of old *Neve* attested by *Norris* and three days hearing of counsel, Lord *Hardwicke* delivered his opinion as follows, the 8th of *February* 1743.

I have been desirous to examine very particularly into the new evidence, in order to prevent any more litigation and expence.

[35] The present application is, for leave to bring a bill, in nature of a bill of review; and this is said to be founded upon new matter, not at all in issue in the former cause, or upon matter which was in issue, but discovered since the hearing of the cause.

Upon these rules, I do allow bills of review have been granted: for though it has been said that these were varied by the order that was made in the cause of *Montgomery* versus *Clark*, yet I see no alteration, and therefore the rules I shall judge by in the present case, must be the ancient ones.

Lord *Bacon*'s rules have never been departed from since the making of them.

By the established practice of the court, there are two sorts of bills of review, one founded *on supposed error appearing in the decree itself*, the other *on new matter which must arise after the decree, or upon new proof which could not have been used at the time when the decree passed*.

The question is, whether in this case the defendants have brought themselves within the rule, and whether there is new matter not existing at the time of the decree, or new proofs that could not possibly be made use of at the former hearing.

It is sufficient to intitle a party to a bill of review, if the new proof did not come to his knowledge till after publication, or when by the rules of the court he could not make use of it.

The construction as to the latter has not been so strict, that the new proof must not come to the parties knowledge till after the cause has been heard; it is very sufficient if it did not come to their knowledge till after publication, or when by the rules of the court the party could not make use of it (1).

Coming to the knowlege of the party's attorney, &c. before the cause was heard, is notice to the party himself.

But if it came to the knowledge of the parties' attorney, solicitor, or agent, before the cause was heard, it is considered as notice to themselves, and is the same thing as coming to the parties' knowledge.

The second question is, supposing it did come to the knowlege of the parties, after the cause has heard, whether it is relevant to the matters in question.

It has been insisted for the defendants in the original and plaintiffs in the cross cause, that the equity to which the new facts are pointed was not in issue at the hearing of the former cause.

(1) *Patterson* v. *Slaughter*, *Amb.* 293.

Now

Now as to this I am clear of opinion, that the equity was as full before the court, in the former hearing, as it can be now.

[36]

For it appeared there that old *Oliver Neve* was the maker of the settlement, that young *Oliver* was an infant, that old *John Norris* was trustee under the settlement during ten years, for the payment of debts; and in that time took a conveyance from the blacksmith, the last remainder-man under the settlement in 1769.

The equity insisted on in the cross bill is, that old *John Norris* ought to be considered as a trustee only, for the parties interested in the trust estate, and that the purchasing the reversion from the blacksmith was a breach of trust in *him* (1), and that the conveyance to *Peter Neve* from the blacksmith ought to be established, and that to *Norris* cancelled, and the proceedings at law stayed.

All the charges relating to the trust, and the execution of it, were made out then, and if facts were put in issue, there is no necessity for the party to point out what will be the effect and consequence of such facts, for the court are to make the inference of law from it, as *ex facto oritur jus*.

If facts are put in issue, the party is not obliged to point out what will be the effect of them, for the court are to make the inference of law from them, as *ex facto oritur jus*.

The defendants then do not want a bill of review to come at this equity, for all the acts which are now said to be discovered, are corroboratives only of the former equity, and therefore there is no ground to grant it upon this head.

Which brings me to the other point, whether they are so many *new proofs*, and that by the rules of publication the defendants were precluded from making use of them at the former hearing.

The first question is, Whether they are new discoveries?

Secondly, Whether they are relevant, and would avail the defendants, if such a bill was allowed to be brought.

Now it does not appear to me, that these are new discoveries, so as to intitle the defendants to a review.

For if they were known to the parties' counsel, or to their attorney, and solicitor, or agents, it is sufficient to rebut such an application, or there would be no end of suits.

How many parties are there, that know not the merits of their own cause, but rely on the skill of their counsel, or solicitor, and therefore what counsel or solicitors know, must be allowed to be the knowledge of the parties (2).

It is sworn by *Martin*, who was attorney for the defendants in the ejectements, that he had the several deeds and writings

Tho' a country attorney acts by an agent in causes in this court, yet he is to be considered as the solicitor likewise, tho' he resides in the country, and what is known to him is constructive notice to his clients.

(1) Vide *Ayliff* v. *Murray*, *ante*, 2 vol. 59. *Whelpdale* v. *Cookson*, 1 *Ves.* 9. *Twining* v. *Morrice* 2 *Bro. Cha. Rep.* 326. *Fox* v. *Mackreath*, *ibid.* 400. *Killick* v. *Flexney*, 4 *Bro. Cha. Ca.* 161.

(2) *Worsley* v. Earl of *Scarborough*, *post.* 392. *Le Neve* v. *Le Neve*, *post.* 645.

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even at the time of the trial, and that upon the death of *Peter Neve*, he found them in his study among other papers, but says he was concerned only as attorney in this trial, but not as solicitor in the cause in Chancery.

But I will consider him as solicitor likewise, notwithstanding he lives in the country, for every body knows that country attornies act by agents in causes here.

The letter of the 3d of *April*, 1679, comes too out of the hands of Mr. *Martin*, but I do not see what inference can be drawn from it, any more than that old *John Norris* was a trustee.

The next thing to be considered is the bill brought by young *Oliver Neve* and old *Norris*, against Mrs. *Neve* and the blacksmith.

Now this very bill was produced on the trial in ejectment, and tho' by an adversary there, yet it is the same as if produced by the defendants, and is a clear notification of the fact.

This trial was eleven years before the cause in equity was heard, so that there was time enough for the defendants to have considered it, and whether the judge did right in admitting it to be read, is not material.

The next is the deed of assignment in 1683, which was likewise known to Mr. *Martin*, and found among *Peter Neve*'s papers, and was therefore constructive notice to his clients.

Suppose then these are not new discoveries, it is a final and conclusive answer to this application for a bill of review, that they existed at the former hearing, and were known to the parties or their attorney, and therefore are not within the rule laid down by Lord *Bacon*.

But suppose them to be new discoveries, and relevant to the case, they can amount to no more than corroboratives only of the former point in equity.

The equity insisted on is this, that old *John Norris* (trustee for a term of 10 years under old *Oliver Neve*'s settlement, antecedent to all the limitations of the estate in the settlement) before the end of the term, and during the infancy of young *Oliver Neve*, takes a conveyance to himself of the reversion from the blacksmith the heir at law of old *Oliver Neve*, for 30 *l*. only, the estate being at least 1500 *l*. *per ann*. as it is now fallen into possession.

[38]

It is extremely wrong for a counsel or agent to take a conveyance from the right heir for his own benefit, which he discovered by being a trustee.

This is a transaction indeed extremely to be disapproved, and I must say that a counsel or agent taking a conveyance from the right heir, for his own benefit, and which he discovered by his being a trustee, does a very wrong thing.

But this is a case *primæ impressionis*, for it would be difficult to say for whom he is a trustee, and yet I should be extremely

desirous

desirous of considering him as a trustee only, if I could be warranted in so doing.

The case which has been cited of *Rumford* market, and other cases of leases (1), are different from this, for there tenant-right of renewals are rather a curtesy from the landlord, and *cæteris paribus* the relations of the same family who took the original lease of bishops, deans and chapters, *&c.* are generally preferred, and they have a natural expectation of it.

Old *John Norris* was equally a trustee in the ten years term, for *Peter Neve*, or *Francis*, as for *Oliver Neve*, for they were all tenants for life under old *Oliver*'s settlement, for it was a trust to pay debts, and attendant on the several limitations and estates created by the settlement.

So that a person equally a trustee for all buys in this reversion, and it is impossible to make the conveyance from the blacksmith to old *John Norris* a trust for *Oliver Neve*, for the maker of the settlement did not intend to give the first tenant for life any interest in the reversion.

Since, as I said before, this is *primæ impressionis*, and no case has been cited in point, but only argued by way of analogy to cases of leases, which I have shewn are very different; it would be too much for me to break into rules for bills of review, for the sake of one particular case only.

For as it is a new point, and no ground to stand upon, the making old *Norris* a trustee for persons who were only tenants for life, and took nothing in the inheritance, would be going too far.

Where the persons, under whom the petitioners for the bill of review claim, were fully acquainted with the matter now complained of 35 years ago, such an effluxion of time, and knowledge of the whole transaction, will have great weight with the court on such applications.

But there is still another circumstance, and that is the great length of time, and the certain knowledge the persons under whom the plaintiffs in the cross cause claim had of *John Norris*'s purchasing of this reversion, and this will make it a question whether it is not such a laches in these persons who are ancestors of the plaintiffs in the cross cause, as will affect them, and be a bar to their claim: for as long ago as the year 1700, it was in the knowledge of these persons, and particularly of **Oliver Neve*, that old *John Norris* had purchased the reversion; and as this is no less than 35 years ago (2), it must have great weight with the court not only from the length or effluxion of time, but from the knowledge the persons had of this transaction, for *Oliver Neve*'s bidding 3000 *l.* and *Peter Neve* 5000 *l.* for the reversion, is a strong circumstance to shew that they were acquainted with old *Norris*'s purchase.

[*39]

Oliver Neve not succeeding in his offer, and having a weakly son between 20 and 21 years old, came to town in order to get a privy seal, to enable his son to join with him in a recovery; and as he could not obtain it, can it be supposed, as he must be exasperated against old *John Norris*'s son for his refusal to join in the application, that he would have resisted so great a temptation, as bringing a bill to be relieved, if there had been any grounds on the head of fraud?

(1) *Vide Pierson* v. *Shore*, *ante*, 1 vol. 480, and the cases there cited.

(2) *Vide Smith* v. *Clay*, *Amb.* 645. *Edwards* v. *Carrol*, 5 *Bro. Par. Ca.* 60.

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The granting such a petition at this distance of time would be a very great hardship on the defendants in the cross bill, who may be deprived of some circumstances, and may have lost papers, they might have availed themselves of when the matter was recent.

Therefore the distance of time is a strong objection, because, when the matter was recent, there might have been some circumstances, and perhaps too some papers, which would have been strong in favour of those who claim under old *John Norris*, that may very probably be lost now, and what makes it likely, is *Peter Neve's* bidding so large a sum as 5000*l.* for the reversion, which shews that he thought it a very valuable thing.

This is the strong point which weighs with me, that after such a length of time, and such great offers made and refused by the persons who claimed under old *John Norris*, that no bill was thereupon brought to set aside the purchase for fraud.

And, as it will be of very bad consequence to let parties enter into the discussion of this matter now, at such a distance, the petition must therefore be dismissed, but without costs.

The order of dismission was appealed from to the House of Lords, and after a hearing of three days affirmed.

The plaintiffs in the cross cause appealed from this order of dismission to the House of Lords, where after a hearing of three days, the order of Lord *Hardwicke*, in a very full House, was affirmed by a great majority, on the 12th of *April*, 1744. (1)

(1) 4 *Bro. Par. Ca.* 465. S. C.

Case 17. *Stevens* versus *Dethick*, *February* 11, 1743.

The trust of a term here was for raising portions for a daughter in default of issue male, payable at 21 or marriage; the mother died leaving no son, and only one daughter the plaintiff's wife, who with her husband brought their bill against the father and the trustees to raise the portion immediately; *the court was of opinion she was not intitled to have it raised in the father's life-time* (1).

A Question arose upon the settlement made on the marriage of the defendant, the first limitation of which was to the defendant for life without impeachment of waste, then to trustees to preserve contingent uses, to his wife for life, remainder to [*40] the first and every other sons of the body of the defendant, and in default of issue male, then remainder to trustees for a term of 500 years, upon trust, that if there shall be one or more daughters, the trustees, their executors or administrators, shall out of the yearly or other rents, issues and profits, or by sale, lease, or mortgage of the said manors, messuages, lands, &c. or any part thereof comprised within the said term, raise and pay unto such daughter or daughters the sum of 2000*l.* for her or their portion or portions, to be paid to such only daughter (if there be but one) at her age of 21 or day of marriage, which shall first happen; and if they all die before their portions become due, then the said payments to cease as to their executors and administrators, and to sink into the estate for the benefit of the person to whom the reversion shall belong: and also that such daughter or daughters shall have, out of the premisses comprised in the term of 500 years, such yearly maintenance as is suitable to their degree and quality; and that the residue of the rents, issues and

(1) See *Stanley* v. *Stanley*, *ante*, 1 vol. 549.

profits

profits above such yearly maintenance shall, *in the mean time* till the portions become payable, be received by such persons as shall be intitled to the reversion, immediately expectant, upon the determination of the said term. STEVENS v. DETHICK.

The mother is dead, and has left no other issue but a daughter who is married, the bill is brought by the husband and the daughter against the father and the trustees, to raise the portion immediately.

Mr. Attorney General, counsel for the plaintiffs, said, if the parties who were owners of the estate have declared, that the portion of the daughter on the failure of issue male shall be raised for her benefit at 21, or day of marriage, a court of justice will not think that it is inconvenient, if the parties to the settlement did not think so themselves.

He cited *Corbet* v. *Maidwell*, 2 *Vern.* 640, 655. and *Eq. Caf. Abr.* 337. to shew that a reversionary term when the time of payment comes, notwithstanding it is not fallen into possession, shall be sold.

He mentioned an authority likewise at common law, *Greaves* v. *Maddison*, 2 *Jones* 201, where three judges were of opinion, that the raising the portion should not wait till the death of the father.

And *Hall* v. *Carter*, heard the 19th of *July*, 1742, before Lord *Hardwicke* (1).

He argued that, if the power of raising the portion should be taken away from her, the daughter might have nothing till she was so old, as not to answer the end for which the portion was given, *the advancing her in marriage*.

It would be very hard, he said, if the daughter here should neither have maintenance or portion, though the time of payment is come, till by the death of the father the term comes into possession. [41]

Mr. *Clark* of the same side cited *Sandys* v. *Sandys*, 1 *P. Wms.* 707. and *Butler* v. *Duncomb*, 1 *P. Wms.* 448.

Mr. Solicitor General, counsel for the defendant, the father, said the general intention of marriage settlements is to put children under the power of the father, and not, as has been argued on the other side, that the daughter in the life-time of the father shall be out of the dependence of the father, and may dispose of herself without his consent, as she has done in this case.

A great inconvenience would result from this construction, for the tearing estates to pieces, and ruining the eldest sons of families, must be the natural consequence; he cited *Reresby* versus *Newland*, 2 *P. Wms.* 93.

Maintenance, in the nature of it, is precedent to the raising of the portion; and as it is most clear that the maintenance here was not intended to commence in the life-time of the father, it is a key to explain his intention as to the portion, that this likewise should not be raised till after the death of the father.

(1) *Ante*, 2 vol. 354. S. C.

STEVENS v. DETHICK.

In the case of *Hall* versus *Carter*, the maintenance was to precede the portion, and given them expresfly for their support till the portion was raised.

LORD CHANCELLOR,

It is a great while since any of these cases have come before the court.

My own general principle has been always against raising portions in the father's life-time (1).

All the old cases are plainly determined against the intention of all fathers: in some very hard cases indeed, where the father has been rigorous and cruel, courts of equity have gone beyond the strict rules of law, and raised it in their life-time.

The first cases of this kind were *Greaves* and *Maddison*, and *Gerrard* and *Gerrard*, 2 *Vern*. 458. and which were followed by some others, but in the case of *Corbet* versus *Maidwell*, 1 *Salk*. [42] 159 *. and 2 *Vern*. 685. Lord *Cowper* made a stand, and upon what foundation did he stop? Why, the general principle he went upon was, that he would lay hold of any words to prevent his being bound by the former cases, rather than introduce the inconvenience of ruining estates; and it is the same ground courts of equity have gone upon in subsequent cases; for if they could find any words or word that were different from former cases, they have laid hold of them to avoid determining like those cases which had introduced such plain inconveniences. *Vide* 2 *P. Wms*. 452. *sect*. 2. the case of *Butler* v. *Duncomb*.

In a conversation between Lord *Macclesfield* and Lord *Trevor* upon this very subject, the former said, he would not carry it further than the cases had already done; says Lord *Trevor*, I hope you will not carry it quite so far.

As instances of clandestine marriages were never more frequent, arguments of publick inconvenience ought to have great weight.

The eldest son is absolutely left in the power of the father during his life, and it is the constant course of most settlements; and yet it is said that younger children, *daughters*, shall soon after twelve years old, perhaps without the leave of the father, demand her portion in his life-time, though she married his footman, or ever so meanly, for there is no difference in the marriage she contracts, if this doctrine should prevail: and while I am upon this head, I must observe, that arguments from publick inconvenience ought to have great weight in this age, as instances of clandestine marriages were never more frequent.

In *Butler* versus *Duncomb*, Lord *Macclesfield* took a middle way; he refused to raise the portion before the term came into possession, but then he made the reversionary term a security for the principal sum.

(1) Vide *Lyon* v. *Duke of Chandos*, *post*. 417.

* A term limited in remainder after the father's death, in trust for raising daughters' portions at such an age, or marriage, when either happens, the portions may be raised in the father's life-time; so if on contingency, and the contingency happens in the life of the father, but not before the contingency happened. 1 *Salk*. 60.

If Brome versus Berkley, Eq. Cas. Abr. 340. is an authority, from the very terms of it, it holds more strongly here, because the bill there was to raise a portion in the life-time of the mother only; there the father was dead, and no issue male, only one daughter; that daughter was married, and considerably advanced in years, and the bill brought for sale of the reversionary term; but refused both here and in the House of Lords; what were the grounds of the refusal? why, that maintenance being given, and by the very terms of the trust to precede the portion, and not be raised till the term took effect in possession, *a fortiori* the portion was not due and payable till then. STEVENS v. DETHICK.

Apply it to the present case.

The trustees of the term are, in default of issue male, *&c.* *vide* the settlement.

And also that such daughter or daughters, *&c.* *vide* the clause of maintenance. [43]

The plaintiff's case here is the same, only there it was prayed to be raised in the life-time of the mother, here in the life even of the father, which, if any thing, is more unfavourable.

The maintenance there was to be raised out of the rents and profits after the first quarter-day when the term shall take effect *in possession*.

Here the words *in the mean time* are words of relation, and refer not only to a time that is to begin, but to a time which is also to end.

Out of what rents, issues and profits can the trustees then receive any thing, can they bring ejectments? No, for they cannot enter to raise money out of the profits till after the death of the father.

I am of opinion that the father might have sold the reversion, subject to this term, which shews that the whole trust of the term was to take effect after the death of the father.

By the same arguments as have been made use of for raising the portion now, the maintenance might be raised in the life-time of the father as well as the portion; but it is the subsequent words that confine it to the time of the term's taking effect in possession.

It is said that in the case of *Brome* versus *Berkley*, there are these words, *take effect in possession*, and no such words here, but made use of there only to shew that maintenance could not be raised in the life-time of the mother.

The same argument will hold full as strong here, for though the words are not exactly the same, yet there are words of equal force, *viz. Expectant upon the determination of the term.*

There are no grounds to decree this otherwise than the case of *Brome* versus *Berkley*, which went through such a solemn determination.

Therefore I think it right, to lay hold of words to support the parental authority, rather than to give licence to daughters to marry improvidently; for which is most likely, that a father should be so unnatural to suffer a daughter to starve who has done

 not

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nothing to merit such usage, or that a child who has little or no experience should be drawn in to marry imprudently, who is entirely out of the controul of the father, and may raise her portion upon his estate in his life-time?

[44]

The case of *Hall* versus *Carter* was very different in many respects, nor was it on a marriage settlement.

The determination that I have *now* given, is rather nearer to the intention of the parties, and at the same time will prevent very great inconveniencies, which are the natural consequence of decreeing portions to be raised in life of the father; and therefore let the bill be dismissed, bnt *without costs*.

2 Stra. 1187. Wilf. B. R. 8 Vin. Abr. vol. 4. p. 9. See Fortesc. Rep. 247.

The following case seems to be a material one in regard to property, and may very probably be often cited in a court of equity as well as in courts of law; and as I happen to have a fuller note of it than any which has yet appeared in print, flatter myself the utility of it will be an excuse for its appearing here.

Case 18. *Hartop* versus *Hoare & al'*, *Easter Term* 16 *Geo.* 2. *B. R.*

Sir *John Hartop*, in 1729, lodged jewels for safe custody in the hands of *Seamer* a jeweller, inclosed in a paper that was sealed, and put in a bag, which was also sealed with the plaintiff's seal, and deposited at *Seamer*'s house, and the same day his clerk gave a receipt for them in these words, Which bag, so sealed, I promise to take care of for Sir *John Hartop*, for my master *James Seamer*; signed *Michael Hull*; and in the receipt all the jewels were specified. In *February* 1735, *Seamer* broke both the seals, took out the jewels, and carried them to Mr. *Hoare*'s the banker's shop, borrowed 300*l.* of the defendant, and deposited the jewels as his own proper goods and as a security for the 300*l.* and gave his promissory note for the same sum; on Mr. *Hoare*'s refusing to deliver the jewels to Sir *John Hartop*, he brought an action of trover and conversion against him; and the jury having a doubt whether the defendant was guilty of a conversion or not, they referred it to the opinion of the court of King's Bench, by finding a special verdict, who this day gave judgment for the plaintiff unanimously (1).

JUDGMENT in this case was given for the plaintiff by *Lee* Ch. Just. who delivered the opinion of the court to this effect.

This is an action of trover and conversion, wherein the plaintiff declared that he was possessed of a pair of single stone brilliant diamond ear-rings, *&c.* as of his own proper goods, and that he lost them, and they came to the hands of the defendants, who converted them to their own use; to this the defendants have pleaded not guilty, and the cause was tried at *Guildhall*, and the jury found a special verdict to this effect.

"That the plaintiff, being owner of the jewels mentioned "in the declaration, on the 12th of *January*, 1729, lodged "them with other jewels for safe custody only in the hands of "*James Seamer*, jeweller and banker, inclosed in a paper, "which paper was sealed, and put in a bag, which was also

(1) Vide *Marsden* v. *Panshall*, 1 *Vern.* 407. *Demainbray* v. *Metcalfe*, 2 *Vern.* 691. *Hoare* v. *Parker*, 1 *Bro. Cha. Rep.* 578. 2 *Durn. & East*, 376. *Warner* v. *Jenkins*, 4 *Vin.* 6. *pl.* 4. *Bluck* v. *Nicholls*, *ibid.* 7. *pl.* 5. *Fotheringill* v. *Frost*, *ibid.* 9. *pl.* 6.

"sealed

"sealed with the plaintiff's seal, and deposited them at Seamer's "house in *Fleet-street*, *London*, and took a receipt for them in "the words and figures following. HARTOP v. HOARE.

"*Jan.* 12, 1729. Received of Sir *John Hartop*, Bart. the "following jewels, *viz.* a pair of diamond ear-rings, *&c.* "(mentioning and describing the jewels for which the present "action is brought) all which are sealed up in a bag sealed "with Sir *John Hartop*'s seal, which bag, so sealed, I pro"mise to take care of for him, for my master *James Seamer.* [45]

"Signed *Michael Hull.*

"On the 3d of *February* 1735, *Seamer* broke both the seals "and took out the jewels, and carried them to the defendant's "shop, which is a public open shop in *Fleet-street* in the city "of *London*, where the defendants carried on the business of "bankers, and also traded in jewels, and frequently lent money "on the security of jewels, and then and there the said *James* "*Seamer* borrowed the sum of 300 *l.* of the defendant, and de"posited the jewels in the declaration mentioned, as his own "proper goods, and as a security for the said sum of 300 *l.* then "paid him by the defendants in their said public and open shop, "and the said *Seamer* then gave the defendants his promissory "note for the same sum so borrowed.

"And they further find that the said *James Seamer* had no "authority from the plaintiff to sell, pawn, or dispose of the "said jewels, and that the defendants not having been paid this "sum of 300 *l.* so lent by them, they had been requested and "refused to deliver the aforesaid jewels to the plaintiff, and have "kept them to their own use.

"That the said *Seamer* continued in possession of the said jewels "until he pledged them to the defendants; that in *January* 1736 "the said *Seamer* became a bankrupt, and that a commission of "bankruptcy was taken out against him (*but that is not material,* "*because the bankruptcy was after the depositing the jewels*).

"Then the jury find the value of the jewels to be 750 *l.* and "upon the whole matter conclude with a doubt, whether the "defendants are guilty of a conversion or not, which they refer "to the court."

The general question is, Whether by any part here found, Sir *John Hartop* the plaintiff, and owner of these goods, is barred from having the goods delivered to him, on the demand that is found in this special verdict to have been made, or in the present action is intitled to a satisfaction in damages for them.

On this question it will be proper to consider, first, on the transactions found by the verdict, in what relation *Seamer* stands to Sir *John Hartop* the plaintiff.

Secondly, to consider the acts of *Seamer*, and how far Sir *John Hartop* is affected by them.

The matter to be determined is, whether any thing done by *Seamer* has devested the property of Sir *John Hartop*, and hath given such a right to the defendants to detain these jewels, as

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shall make their detainer and their keeping them to their own use to be no conversion.

Sir J. H.'s delivery of the jewels to Seamer, a bare naked *bailment* of them for the use of the bailor.

As to the first point, I think it clear that Sir *John Hartop*'s delivery of the jewels to *Seamer* was a bare naked *bailment* of them for the use of the bailor.

It is expresly found that they were lodged for safe custody only, sealed up in a paper put into a bag, which was also sealed, and that *Seamer* had no authority from the plaintiff to sell or dispose of them.

The difference between bailing and pledging of goods is, that a *pawnee* hath a special property, and a *bailee* the custody only.

This is therefore what Lord Chief Justice *Holt*, in his enumeration of the several sorts of interests that a man may have in goods, in the case of *Cogs* versus *Bernard*, *Salk.* 26. calls a deposit of goods. In 5 *Co.* 80, 84. *Southcote*'s case, a difference is taken between bailing and pledging of goods, for a pawnee hath a special property, and is not considered as one who hath the custody only, as appears to be the case of *Seamer*, to whom these jewels were delivered to keep for the use of the bailor only.

Seamer's breaking the seal, taking the jewels out and disposing of them, made him a trespasser to Sir J. H.

As *Seamer* had these goods by the delivery of Sir *John Hartop*, in this particular manner, *Seamer*'s breaking the seal and taking the jewels out of the bag, and disposing of them, made him a trespasser to Sir *John Hartop*, according to the opinion of *Anderson* in *More* 248.

Though trover will not lie against a carrier for neglinence, yet if he breaks open a box, and takes the goods, trespass will.

In all cases where a person to whom goods are delivered hath neither a general nor a special property, if he converts them to his own use, trespass will lie; *Anderson* there says, that it is otherwise of a bailee; but he must mean such a bailee as hath a special property, and that *Seamer* had not; and with this opinion of *Anderson* the opinion of Lord Chief Justice *Trevor* agrees in *Salk.* 605. that though trover will not lie against a carrier for negligence, yet if he breaks open a box, and takes the goods, trespass will lie against him.

The next thing to be considered is, how far Sir *John Hartop*, the true owner of these jewels, is affected by any thing that is found to be done by *Seamer*, who was only entrusted with the custody of them under very special circumstances, in respect to their being sealed up in a paper and bag in the manner that has been mentioned, and whether Sir *John*'s property be devested thereby.

Seamer had no kind of property either general or special; he came to the possession of the jewels by right originally, but when he broke the seal, and took the jewels out of the bag,
[47] and by that means enabled himself to deliver them openly to the defendants, he was possessor *malæ fidei*, and went to the defendants as such.

But it was objected that *Seamer* was the possessor of the jewels, and that is sufficient for the defendants who were not privy to *Seamer*'s wrong, (and I dare say they were not), and that the defendants dealt with *Seamer* in the way of their trade, and honestly

neſtly advanced their money on the ſecurity of theſe jewels, of which *Seamer* appeared to be the viſible owner.

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And to be ſure, as it is hard on the plaintiff to have his jewels diſpoſed of diſhoneſtly, ſo it is hard on the defendants to loſe their money; and it was urged for them, as the plaintiff truſted *Seamer*, and the defendants were ſtrangers to him, it was more reaſonable the loſs ſhould fall on the plaintiff, than on the defendants.

And on this head was cited *Salk*. 289. *Hen* verſus *Nicholls*, before Lord Chief Juſtice *Holt* at *Niſi prius*, that was an action on the caſe for ſelling the plaintiff one kind of ſilk, pretending it to be of a different kind, and on trial upon not guilty it appeared, that there was no actual deceit in the defendant who was the merchant, but in his factor who was beyond ſea, and the doubt was if this deceit could charge the merchant; and *Holt* was of opinion that the merchant was anſwerable for the deceit of his factor, though not *criminaliter* yet *civiliter* (*and then comes that part of the caſe for which it was cited*); for ſeeing ſomebody muſt be a loſer by this deceit, it is more reaſonable that he, who employs and puts a truſt and confidence in the deceiver, ſhould be a loſer, than a ſtranger, and upon this opinion the plaintiff had a verdict.

And there is no doubt but the verdict was right in that caſe, for the defendant employed his factor in the act of ſelling, in which the deceit was committed, and by employing him as a factor, he created a credit in him.

But that is not the preſent caſe, for the plaintiff here gave no power to *Seamer* to do the act in which the deceit was, but on the contrary hath uſed a prudent method to prevent it; the preſent caſe therefore is like the caſe in 1 *Inſt*. 89. where *A*. leaves a cheſt locked with *B*. and taketh away the key, there *A*. does not intruſt *B*. with the goods.

The preſent caſe falls within the rule laid down by Lord *Coke*, that where *A*. leaves a cheſt locked with *B*. and taketh away the key, there *A*. does not intruſt *B*. with the goods, but is a depoſit for ſafe cuſtody only.

As here does not ſeem to be any fault either in the plaintiff or defendant, let us now ſee what the common law pronounces on theſe tranſactions excluſive of the cuſtom of *London*.

The caſes, in which ſales in market overt had been pleaded and diſallowed, are extremely ſtrong to prove, that this diſpoſition by *Seamer* does not affect the property of the plaintiff.

In *More* 624. In an action of trover for jewels, one pleaded the cuſtom of *Briſtol*, that every ſhop there is a market overt every day except *Sunday*, and that the jewels were ſold to him in his ſhop in *Briſtol*, he being a goldſmith; and on demurrer, the plea was held to be ill, becauſe he did not aver that it was his ſhop in which he uſed to exerciſe the trade of a goldſmith, which he ought to have done, for if the jewels were ſold in another ſhop, it would not toll the property of the owner. [48]

In *Cro. Jac*. 68, 69. where to an action of trover the defendant pleaded the cuſtom of *London*, &c. and that he, being a mercer, bought their wares in his ſhop wherein he uſed to buy ſuch

wares;

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wares; and on demurrer to the plea it was held to be ill, because the wares were not agreeable to his trade; and there it was said, that the custom was too general, that every freeman might buy all manner of wares in every shop, &c. for then a scrivener might buy plate in his shop, and the like, &c. which is not reasonable.

These cases shew, that though the seller was a stranger to the party, and though he bought for a valuable consideration, yet such sale did not bind the true owner, nor justify the conversion, unless he brought himself within the custom of market overt, in which case the sale binds, by reason of the default in the owner, and is compared to the case of a fine and non-claim. 35 *H. 6. fol.* 29. and in *Bacon's Treatise, concerning the use of the Law, fol. edit.* 80. Property of goods by theft, or taken in jest, where the sale is in a market overt, or fair, shall bind the owner being not the seller of the property, it must be in a market or fair where usually things of that nature are sold.

In the case in 15 *H.* 7. 15. an action of trespass was brought for taking so many slippers; the defendant pleaded that he was himself possessed of so many pieces of leather, and bailed them to one *J. S.* who delivered them to the plaintiff, and afterward the plaintiff made of them slippers, shoes, and boots, and justifies the seizing of them as his property, and the plaintiff took exception that the colour was not good: And the first question was, whether the plea did not amount to the general issue; and secondly, whether the sale did give the plaintiff so much as a colour to take them; and the opinion of the court was, that the plea was good, and that it was a good colour, because the bailee had a lawful possession; in which case, when he gives them, it is a good colour for the vendee (the plaintiff is called the vendee) to take them, in which case the plaintiff hath colour by the gift of him who who had the lawful possession, to punish any stranger to him who took the goods; but it was held to be colour only, and judgment was given for the defendant: on the second point, whether the property of the leather was changed by being made into shoes? It was held it was not.

[49]

The true owner of goods does not lose his property by a sale made by the possessor of them, unless it were in market overt.

By this case it is very apparent, that the true owner of goods does not lose his property by the sale made by the possessor of them, unless it were in market-overt; and in the cases stated, no regard is had to the vendee's ignorance of the vendor's want of title; no regard to the vendee's coming rightfully to them as a purchaser without notice; no regard to the vendor's having the lawful possession of them.

These cases are all grounded on what is mentioned in 2 *Inst.* 714. *Caveat Emptor*, & *Spoliatus debet ante omnia restitui.*

But to impugn this doctrine, some cases have been cited, *Hussey* versus *Jacobs*, *Mich*, 8 *W.* 3. *B. R. Salk.* 344. The Lord *Chandos* lost money at play to *Hussey*, and gave him a bill for it on *Jacob*, who accepted, and afterwards refused to pay, and an assumpsit was brought against *Jacob*, and he pleaded the 16 *Car.* 2. *c.* 7. An act against deceitful, disorderly and excessive gaming; to which it was demurred; and

and the court held, that though this is a kind of new contract, yet all is founded on the illegal and tortious winning, and only secures the payment of that money, and therefore it is within the statute, the plaintiff being privy to the first wrong; but if *Hussey* the plaintiff had assigned this to a stranger, *bona fide*, upon good consideration, he had not been within the statute, for he was not privy to the tort, but an honest creditor. This case is also reported in *Carthew* 357. and there it was said by the court, that, as to the inconveniency concerning trade, there can be none in this particular case, because the bill is gone no further than to the first hands, (*viz.*) to the hands of the plaintiff *Hussey*, who won the money, and so no damage could here accrue to any person, but to him who is certainly within the statute; but if this bill had been negotiated, and indorsed to any other person for value received, then it might have another consideration. HARTOP v. HOARE.

This seems to be very reasonable, for the acceptance made a new contract: In the case of *Hussey* versus *Jacob*, the judgment was for the defendant, because the acceptance was not considered as distinct from the consideration, the action being brought by the winner, yet in that case it is said, that the acceptance makes a new contract; if, therefore, it was between strangers to the gaming, as between the acceptor and the assignee, I should think the statute of gaming might be quite out of the case.

In *Salk.* 126. *Mich.* 10 *W.* 3. Lord Chief Justice *Holt* mentioned this case; if a bank note be payable to *A.* or bearer, any person who finds it, is so far considered as the bearer, that a payment to him will discharge the bank. And so *Salk.* 125. *Hodges* versus *Steward*, *Pasch.* 3 *W.* & *M.* *B. R.* If a bill of exchange be payable to *J. S.* or bearer, if the drawee pays it to the bearer, though he comes to it by trover, theft, or otherwise it will discharge him; but yet, Lord Chief Justice *Holt*, in *Salk.* 126. says, that the finder of such a bill hath no property against the true owner; if a third person purchases a bank bill of the finder without fraud, he hath gained a title to it in the usual manner, by making himself the bearer of it for a valuable consideration; and on this, is the opinion of Lord Chief Justice *Holt* founded, that a property is created in the bearer, in respect to the usual course of business and transactions of this sort, in which the trading with bank notes hath been looked on as changing money for money, or gold for silver; where a bank note is payable to the bearer, it is considered as cash, and the delivery of the note, by the course of business, does create a property in the person who becomes the bearer of it for ready money, but there is no such course of trade in respect to the gaining of property in goods. [50]

Property, by the rule of law, does not follow the possession, unless in cases where the true owner hath no marks to ascertain his property, as in money, *vide Cro. Eliz.* 746. *Higgs* versus *Holiday*, where it was held, that if a man delivers money to another,

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another, the property thereof is in the bailee, becauſe it cannot be known.

Ford verſus *Hopkins*, *Salk.* 283. Trover for million lottery tickets, upon evidence it appeared, that the plaintiff had given the tickets in queſtion to a goldſmith to receive the money due on them; that ſome payments were due, and ſome were not; that this goldſmith had received tickets of tbe defendant, and given him a note to pay him ſo many million lottery tickets; that the plaintiff's tickets were delivered to the defendant by the goldſmith upon this note; and it was held by Lord Chief Juſtice *Holt*, that if money is ſtolen, and paid to another, the owner of the money can have no remedy againſt him that received it. But if bank notes, exchequer notes, or million tickets, or the like, are ſtolen or loſt, the owner has ſuch an intereſt or property in them, as to bring an action into whatſoever hands they are come.

This muſt mean, that the owner can bring an action for them, into whatſoever hands they come without a *valuable conſideration* paid for them; for if it be not thus underſtood, what *Holt* ſays here, will not agree with his former opinion, *fol.* 126. and *Holt* ſaid further, that money or caſh is not to be diſtinguiſhed, but theſe notes or bills are diſtinguiſhable, and cannot be reckoned as caſh, and they have diſtinct marks and numbers on them; but if they had been ſold for a valuable conſideration before the money had become due, he doubted whether it would have transferred the property; and he held, that by the delivery of the plaintiff's tickets to the defendant, the property of them was not changed.

[51]

No inſtance where a diſpoſition made by a mere poſſeſſor of goods, hath been held to change the property of the owner, where they have marks by which they may be known.

In the caſe at bar, the owner is found to have given no power to *Seamer* to ſell theſe jewels, and no caſe has been cited in which a diſpoſition made by the mere poſſeſſor of goods, hath been held to change the property of the owner, in a caſe of goods that have marks whereby they may be known; and thoſe caſes relating to the transfer of bank notes, depend on the particular circumſtances in reſpect to theſe bank notes being conſidered as caſh.

The caſe that warrants this diſtinction, is the caſe of *The Bank of England* verſus *Newman*, determined by Lord Chief Juſtice *Holt*, *Paſch.* 11 *W.* 3. aſſumpſit for 60 *l.* on the general iſſue; the evidence was, that *John Bellamy* had given a note to the defendant for 60 *l.* payable to him or bearer ſix months after date; the defendant went to the bank, and negotiated it with the bank, diſcounting intereſt for the ſame, but did not indorſe the bill; *Bellamy* broke, not having paid this bill; and the bank brought this action againſt *Newman*, and the jury found for the plaintiff; but the court granted a new trial, and held this to be a verdict againſt law; and *Holt* ſaid, if a bill or note be payable to a man or order, and he delivers it for ready money, and not for money antecedently due, or lent upon it, it is a ſelling of the bill like a ſelling of tallies in bank bills, and if no indorſement be made thereon, the vendee is without remedy againſt the vendor, but if there be an indorſement,

ment, he may have remedy against the indorsor, provided he demanded the money of the drawer in convenient time, and therefore the bank had no remedy against *Newman*, though they had advanced the money, and the court looked on it as a sale of the note.

This case shews, that the transferring these notes is considerdered in the same light as the changing money for money.

Taking it then that the property of Sir *John Hartop* was not changed by the disposition of these jewels made by *Seamer*, as considered at common law, the next matter to be considered will be, whether the place where the pawn is found to be made will intitle the defendants to detain them.

It is found that *Seamer*, after he had broke open the bag and taken out the jewels, and carried them to the defendants' shop, which was an open publick shop in *Fleet-street* in the city of *London*, where the defendants carried on the trade of bankers, and also traded in jewels, and frequently lent money on the security of jewels, and in the publick shop of the defendants the said *Seamer* borrowed of the defendants 300 *l.* and deposited the jewels as a security for the same.

On this finding, the custom of *London* as to sales in market-overts hath been insisted on for the defendants, and that pawning comes within that custom.

As to this it was answered by Sir *John Strange*, that no custom is found by this special verdict, and therefore the court cannot judicially take notice of this custom. [52]

And we are of opinion, that the court cannot judicially take notice of it on this special verdict.

The custom of *London* as to sales in *market-overt* being not found by the special verdict, the court held that they could not judicially take notice of it, but taking it as stated, they were of opinion it does not extend to pawning.

In the case of *Arguille* v. *Hunt* (1), in this court, *Trin.* 5 *G.* 1. a prohibition was moved for to the spiritual court for a suit there, for calling a woman whore in *London*, and the want of jurisdiction appeared on the face of the libel; but because the custom of *London* to cart whores was not set forth in the libel, the prohibition was denied, and it was determined that the court could not judicially take notice of the custom of *London*, and the same thing is also determined in *Carthew* 75. but it was said for the defendant, that this custom need not be found by the jury, because it cannot be proved by witnesses, but must be certified by the recorder of *London*; but I think this no sufficient answer to the objection arising from the want of finding the custom.

In the case of *Day* versus *Savage*, *Hob.* 87. it is cited to have been adjuged that the custom of *London*, that every day there, except *Sunday*, is a market-overt, ought to be tried by the jury, and not by the certificate of their recorder; but that hath been since determined to be otherwise in the case of *Appleston* versus *Stoughton*, *Cro. Car.* 516. Sir *William Jones* 412. But in all the cases the custom is either pleaded specially, as in *Cro. Jac.* 68. or else it is found by the jury; and if this be so, that the court cannot judicially determine of the customs of *London*, but they

(1) 1 *Stra.* 187. S. C.

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ought to be pleaded or found; then what was [redacted] to pawning being to be taken to be equal to a sale, will be quite out of the question.

But however we are of opinion, that taking the custom of *London* to be as stated in 5 *Co.* 83. *b.* this custom does not extend to pawning. It is a constant rule that customs are to be taken strictly. *Perkins, sec.* 435. *Noy's Max,* 78. 2 *Sid.* 139. *Lamb.* 619.

The disposition of a pawn is quite variant from a sale, for a vendee can transfer the thing to any other, and trade is thereby promoted; otherwise in pawns, for they stop the change of the property in the things pledged.

[53]

Then since the customs are to have a literal and strait interpretation, as the custom is only for a sale in open shop to bind the property of a stranger, that custom cannot extend to a pawn, which is a disposition quite variant from a sale; by a sale the vendee can transfer the thing to any other, and trade and traffick is promoted thereby, but it is quite otherwise in the case of pawns, for they tend to stop the change of the property of the things that are pledged, and therefore if there is any difference between a sale and a pawn, that is a sufficient reason why the custom which is affixed to the one, should not extend to the other; and therefore the question is not, whether it be a reasonable custom, that a pawn in an open shop in *London* should bind the property of a stranger; but the true question is, whether a pawn and sale be the same, for if they be not the same, then pawning will not fall within the custom. that a sale in market-overt in an open shop in *London* binds the property of a stranger.

To shew that pawning goods in *London* will not bind the property of a stranger, I will mention the case in the *Year-book*, 35 *H.* 6. *p.* 25. and is in point; it was an information in the Exchequer for the King's jewels; the defendant pleads the custom of *London*, that if any goods be pawned there, the pawnee may detain them until the money lent upon them be paid; and pleads further, that he did not know that they were the King's jewels, and that they had not the King's arms or marks upon them; and to this plea there was a demurrer and judgment for the King, because it is not a good custom that a pawn should bind the property of a stranger, and though it was said at the bar the judgment in that case was given on another point, that the custom should not bind the King by reason of his prerogative, yet it is not so, for both points were resolved, and judgment was given upon both; and *Jenkins* in abridging the case, *fol.* 83. says, that the custom of *London* doth no where extend to the King's goods, nor to a pawn of them.

As there is no instance that the custom of *London* hath ever been allowed in the case of a pawn, the pawnee has not any title to retain the goods against the true owner.

As there is no custom found by the verdict, and as there is no instance that the custom of *London* hath ever been allowed in case of a pawn, but a resolution in the *Year-book*, and the opinions of Judge *Jenkins* are to the contrary, I think the defendants cannot have any title to retain these goods.

On the foundation of such a custom much was said at the bar upon the act against brokers, 1 *James* 1. *ch.* 21. which, in the preamble of it, is said to be made "for the defence of honest "and true mens' property, and interest in their goods."

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The first of *James* against brokers being of great consequence to the trade of *London*, the court declined giving any opinion on the construction of it, as the present case did not make it necessary for them to do.

* What was said upon it was very material; but as the construction of this act is of great consequence to the trade of *London*, we have avoided giving any opinion about it, being unanimous for the plaintiff without the aid of this statute, as my brother *Chapple* before he went out of town declared, he agreed with us intirely.

Seamer and Others versus *Bingham and Others*; *and Strode and Others* versus *Strode*, *June* 11, 1743.

[54]

Case 9.

S.C. 2 Ves. 121. cited.

THE father of archbishop *Wake*, by a deed on the marriage of the archbishop, settles the estate now in question (1), upon the issue male of the archbishop, and if no issue male, then he directs the estate to be sold, and to be divided equally among the archbishop's daughters.

By a deed of the 29th of *April* 1702, the archbishop (2) directs his estate to be sold, and the money arising from it to be divided equally among his six daughters, provided he should have no son.

After the marriage of *Esther* one of the daughters to *Richard Broderipp*, he, "by deed dated the 7th of *October* 1714, made "between him and *Esther* his wife of the one part. Doctor "*Wake*, afterwards archbishop of *Canterbury*, of the other, "reciting the deed of the 29th of *April* 1702; did covenant, that "all such right either in land or money as should at any time "accrue to *Hester* in her life, or to *Richard* in her right, by "virtue of the recited deed, should be vested in the three per- "sons, who were likewise parties to the indenture in 1714, in "trust that they and the survivor, &c. should put out such share "of the money raised by the sale of the manors, &c. as belong- "ed to *Hester*, at interest on a good security, and the rents and "profits of her share of the said estate, and the interest of the "money raised by sale of her share, should pay to *Richard Broderipp* during his life, and after his death to *Hester* during "her life, and after the death of the survivor of them should "pay all the principal money to the issue of *Richard Broderipp*

(1) After the decease of the father and son and subject to certain limitations since determined, and to a term of 500 years for younger childrens' portions, to such uses as *W. Wake* the father should direct or appoint.

(2) "*W. Wake* the father, limits "the use to trustees, in trust for the "son (the archbishop) for life, remain- "der to first and other sons, and in de- "fault of sons (which in the event "happened) he directs, &c."

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"and *Hester* (other than and besides such issue male of *Richard* "by *Hester*, who for the time being should be immediately in-"heritable to the manors, lands, &c.) equally between them "share and share alike, to sons at 21, and daughters at 21, or "marriage; and if any of the children should die before their "shares should become payable, to go to the survivors; but "in case all should die, then the money to be paid to such son "who should be inheritable as aforesaid; and if no such son, "then to be paid to the survivor of *Richard Broderipp* and "*Hester*, and the executors, administrators, or assigns of such "survivor."

George Broderipp, the only child born of this marriage, survived his father, and afterwards arrived at his age of 21 (1), is now dead in the life-time of his mother, who is married to a second husband the defendant *Strode*.

[55] *Thomas Broderipp*, heir at law of *George*, insists that the interest of *Esther* ought to be deemed real estate, and that it vested in *George*, *Esther*'s son, in nature of a remainder after her death, and that it is now descended on him.

The plaintiffs, who are the children of *Richard Broderipp* by a first venter, and half sisters of *George Broderipp*, insist that this share must be considered as money, and that it vested in *George Broderipp*, and consequently was transmissible to his personal representatives.

The defendant *Thomas Strode* and his wife insist, that if there was such indenture or deed of 1714, and the defendant *Esther* named, or made a party thereto, that she never executed the same, and was not, nor could be bound thereby, and that she was not only at the time a feme covert, but an infant of 16 years of age, and such deed being made and executed after her marriage with *Richard Broderipp*, the same was merely voluntary as to her.

LORD CHANCELLOR,

In the first place this is a pretty harsh demand in the plaintiffs, who claim two-thirds of this contingent interest, though at the same time they are no relations at all of *Esther Strode* or of archbishop *Wake*, but only half sisters of *George Broderipp*, and daughters of *Richard Broderipp* by a first venter.

Therefore if a reasonable construction can be put, which will prevent these consequences from happening, it is what a court of equity would incline to do, as the parties to the deed themselves would have guarded against them.

The case has been properly divided into three questions:

First, Whether by the deed of the 7th of *October* 1714, executed the day after the marriage by *Richard Broderipp* the husband,

(1) It is not stated in the Register's book whether *George* attained 21; nor does it seem material, for the devise runs, that in default of younger children, *the money to be paid to such son, who should be inheritable as aforesaid.* So that the time of payment or vesting is not at 21, but at the decease of the survivor of the father and mother. This seems to be the ground of Lord *Hardwicke*'s decree. See *post*. 58, and the cases cited *post*. 57.

band, and archbishop *Wake*, the property of *Esther Strode* is bound as to her share of her grandfather's estate. SEAMER v. BINGHAM.

The second question, if it did not bind her, whether the act she did by executing a deed on her marriage with *Strode* in 1738, is an acquiescence and binds her, (for there the deed of 1714 is recited, and that *Esther* was a party, and that she secures her interest in that deed as a provision for her children, and herself if she survives).

Thirdly, If it did not bind her, then what is the construction of the trusts of the deed of the 7th of *October* 1714.

As to the two first questions, whether she was bound by the execution of the deed of the 7th of *October*, or by the subsequent act, I shall give no opinion: but I should think she was not bound. [56]

If it was real estate, all these questions would be out of the case.

But I must consider it as money, it being directed to be sold.

The rule of this court is, that land to be turned into money is considered as money.

But it has been truly said, that there are cases where persons may insist in this court upon the land itself; that is, where the parties all agree that it shall not be turned into money (1), but if any of them oppose it, the court will direct it to be sold.

There is another reason in this case, because here one of the daughters had the pre-emption given her.

I do not take the deed in 1714, to be a settlement for a valuable consideration.

I agree there are cases where a father contracting for an infant child shall bind the child (2), especially if the child claim any thing under the settlement; but then it must be before marriage (3), and in consideration of the marriage; for the court will not suffer her to claim benefit one way, and not to be bound the other.

But this being after marriage is voluntary (4), and being the next day after the marriage does not differ the case, for whether two days or six, or six years, it is the same thing.

No recital of the father will bind the property of the daughter, but there must be some proof of the father's intention to do it.

There is no such proof in this case. It might be a reasonable caution in the husband to secure some provision for the children, but yet I am of opinion it could not bind the mother.

The deed is by way of covenant, that all the interest which she should claim under the deed in 1702, should be conveyed to *Bennet*, &c.

(1) See *Anon.* 1 *P. W.* 648.

(2) *Vide Harvey* v. *Ashley*, *post*. 607.

(3) *Vide Lucy* v. *Moor*, 3 *Bro. Par. Ca.* 514.

(4) *Fitzer* v. *Fitzer*, *ante* 2 vol. 511. *Taylor* v. *Jones*, *ibid.* 600.

When

SEAMER v. BINGHAM.

When is the time the principal money is to be paid? why, after the death of the ſurvivor of father and mother, for till then it was to veſt in truſtees.

[57] But it is ſaid the time of payment there, is to be conſidered at the age of twenty-one or marriage. I am of a different opinion, for this is only a circumſtance or qualification of the perſon receiving, and the words at their age of twenty-one, or marriage, is not to accelerate the payment, or *to veſt it* in the children (1); but the plain meaning of the words is, that if the father and mother had died during the infancy of the children, that it ſhould not be paid before their marriage, or twenty-one.

It has been ſaid that it ſhall veſt at twenty-one, and be tranſmiſſible to the repreſentatives, though not payable till after the death of the ſurvivor of father and mother.

Suppoſe *A.* by will directs a ſum to be paid at twenty-one, or marriage, and there are no words of gift, or intereſt to be paid, it ſhall not veſt before that time.

The direction of the payment here is the gift, and therefore will not veſt till the time of payment comes; and beſides, there is no intereſt given, which makes the caſe ſtill ſtronger.

The meaning of the clauſe of proviſo was plainly this, that if any of the younger children died before the time of payment came, that it ſhould not go to their repreſentatives, but to the ſurvivor of the brothers and ſiſters.

It is ſaid this is a ſevere conſtruction, becauſe ſome of the younger children might live to twenty-one, or might want the money to advance them in marriage; and it would be hard, if they died in the life-time of the father and mother, that their ſhare ſhould go to their ſurviving brothers and ſiſters rather than to their own children, if they ſhould leave any at their deaths.

But whatever hardſhips there may be in this caſe, I am to govern myſelf by the words of the deed; and moſt clearly, on the conſtruction of this deed, their ſhare would ſurvive to the other younger children.

I take the words *for the time being* to relate to the time of payment, the death of the ſurvivor of father and mother.

Or otherwiſe a great abſurdity would follow: for ſuppoſe at the death of the father there were two ſons and two daughters, and the eldeſt ſon arrived at the age of twenty-one, but dies without iſſue in the life-time of his mother; and afterwards, at her death, the next ſon ſhould become inheritable, would he be intitled? I am of opinion he would not, for it was the intention of the deed to exclude ſuch ſon as ſhould be inheritable *at the time being*, the death of the ſurvivor of father and mother.

(1) So *Billingſley* v. *Wills*, *poſt*. 219. *Vide etiam Benyon* v. *Maddiſon* 2 *Bro.* 221. *Sed contra Wheedon* v. *Fell*, *ante* 2 *Cha. Rep.* 75. Vol. 124. *Hewtley* v. *Maſon*, *Amb.* 621.

"And

"And in case there shall be no such son, &c."

That is *no son* who at the time of the death of the survivor of father and mother shall be inheritable: which shews that the whole deed is connected to the time of payment, the death of the survivor of father and mother.

Though it is very true there is no time of payment taken from the condition or circumstances of such son who is inheritable, yet there is a time of payment equally applicable, which is the death of the survivor of father and mother.

I think the meaning of the parties to be, that if there should be no child at the death of the father and mother, that it should be in the power of the survivor to dispose of it absolutely.

Lord *Hardwicke* decreed the estate in question comprised in the deed of the 29th of *April* 1702, to be sold, and the money arising by such sale to be divided into six equal parts, and such six parts to be considered as the several shares of the six daughters of Doctor *Wake*, late archbishop of *Canterbury*, *Elizabeth* the seventh daughter having died unmarried and without issue; and a question being made in these causes, whether the sixth part, which was the share of the plaintiff *Hester* first married to *Broderipp*, and now to *Strode*, belong solely to *Hester* as having survived her husband *Broderipp*, and all the children of that marriage, or ought to be distributed as part of the personal estate of *Broderipp* her son; his Lordship declared, that he was of opinion that the said share belongs solely to the plaintiff *Hester*.

Butler an Infant by his Guardian Plaintiff, *and Freeman and John Butler* Defendants, *June* 22, 1743. Case 20.

THE grandfather of the plaintiff, by will, after directing his debts and legacies to be paid, *gives all the rest and residue of his personal estate to his grandson the plaintiff at his age of twenty-one, and if he die before that age, then to the defendant* Freeman, *whom he makes his executor.*

S. C. cited 2 Vef. 430. *B.* gives all the rest and residue of his personal estate to *his grandson* at 21, and if he die before that age, then to *F.* whom he makes his executor; the grandson is not intitled to the interest arising from this residue, but must accumulate till he arrives at 21. (1).

The plaintiff has brought his bill for the interest of the residue to be paid to him during his infancy.

The defendant *Freeman* by his answer insisted, that the plaintiff is not intitled to it, unless he attains his age of twenty-one, but that it ought to accumulate, and if the plaintiff dies before twenty-one, that it will equally belong to the defendant with the residue.

The defendant *John Butler*, the father of the infant, insisted, that *the residue* must be confined to what the testator left at the

(1) See *Heath* v. *Perry*, *post*. 102. and notes.

Butler v. Butler.

time of his death, and that the intereſt made after his death, ought to be conſidered as an undiſpoſed part, and go to him as the next of kin to the teſtator, according to the ſtatute of diſtributions; or if the court ſhould be againſt him in this point, that then he is intitled to receive it for the maintenance of the plaintiff.

The plaintiff's counſel argued, that the intereſt ought to follow the principal, as the ſhadow does the ſubſtance, and therefore that the deviſe of the reſidue will carry it; and cited the caſe of *Green* verſus *Ekins*, *December* 6, 1742. *.

* *Vide ante*, vol. 2. 473.

The counſel for the defendant *Freeman* inſiſted, this was a contingent deviſe to the plaintiff, and as it does not veſt till his age of twenty-one, he cannot be intitled to the intereſt, but that it ought to be received by a truſtee in the mean time, and placed out in real or government ſecurities for the benefit of the plaintiff, if he comes of age, if not, for the benefit of the defendant *Freeman* the remainder-man.

The counſel for *Butler* the father inſiſted on the ſame points as are already ſtated by the anſwer of the defendant.

Lord Chancellor,

I am of opinion that the plaintiff is not intitled to the intereſt that ariſes from this reſidue, and though the words *reſt and reſidue* muſt be confined to what ſhall be found at the death of the teſtator, after his debts, funeral expences, and legacies are paid, yet that the intereſt ought to accumulate till the plaintiff arrives at his age of twenty-one, and as often as it amounts to a competent ſum, to be placed out by a truſtee appointed by the Maſter.

The court doubtful how the intereſt would go if the grandſon died before 21, whether to his repreſentative or to *F.* (1).

I am not quite ſo clear how this intereſt would go, if the accident ſhould happen of the plaintiff's dying before twenty-one, whether to the repreſentative of the plaintiff, or to the defendant *Freeman*, and if there had been occaſion, ſhould have been glad the caſes had been looked into and argued over again; but as this queſtion may never ariſe ſince the plaintiff may live to be twenty-one, there is no neceſſity for another argument at preſent.

The reſidue being given by a grandfather to a grandſon on a contingency of his attaining 21, and nothing ſaid of the application of the produce, he is not intitled to be maintained out of it.

As to the defendant *John Butler*'s claims, I am of opinion he has no right to the intereſt, becauſe the teſtator has given all *the reſt and reſidue* of his perſonal eſtate, ſo that he cannot be ſaid to have left any part undiſpoſed, and conſequently can *have no title to it as next of kin under the ſtatute of diſtributions; for as the deviſe of the reſidue is contingent, it not veſting till the grandſon's age of twenty-one, the intereſt is ſo likewiſe, and muſt accumulate in the mean time; nor can the defendant *Butler*, by the rules of this court, intitle himſelf to it as maintenance for the infant, becauſe it is given by a grandfather to a grandſon upon a contingency of attaining his age of twenty-one; and as nothing is ſaid how the produce of it ſhall be applied, he is not intitled as a grandſon to be maintained out of the produce.

[*60]

(1) But ſee *Green* v. *Ekins*, *ante*, 2 vol. 476. note 3.

The

The law of nature obliges only fathers to maintain their children, and unless the child from the mean circumstances of the parent is in danger of perishing for want, the court will not direct the interest that shall be made of a contingent legacy to be applied for that purpose; so that unless the parent is totally incapable, or under particular circumstances, as having a numerous family of children, and is bordering upon necessity, the law of the land, and of nature, make it incumbent upon the parent to maintain his child (1).

BUTLER v. BUTLER. The court will not direct the interest of a contingent legacy to be applied for the child's maintenance, unless from the poverty of his parent he is in danger of perishing for want.

I was counsel in the cause of *Ackerley* versus *Vernon*, 1 *P. Wms.* 783. where the testator Mr. *Vernon* had left 6000 *l.* to the plaintiff his niece to be paid her at her age of twenty-one, and she insisted that the interest of this money ought to be allowed for her maintenance; and Lord *Macclesfield* who directed this cause to be argued only by one counsel of each side, was of opinion, that the interest in this case ought to follow the principal, for it was a vested legacy, and payable at twenty-one.

A parent must maintain his child unless totally incapable or by having many children borders upon necessity.

But there it was a sum of money separated and detached from the rest of the estate, and a vested legacy; here it is a contingent one, and not a specific sum, but *of the residue of his personal estate*, which makes a difference between the cases; and the father likewise in the present case possessed of a good estate, and in considerable circumstances.

Therefore his Lordship (2) decreed the interest which has arisen upon the residue of testator's personal estate since his death, or which may arise, to be paid into the hands of a trustee, to be laid out in real or government securities as often as it shall amount to a competent sum (3).

(1) So *Jackson* v. *Jackson*, *ante*, 1 vol. 515. *Fawkner* v. *Watts*, *ibid.* 408. *Darley* v. *Darley*, *post.* 399. *Roach* v. *Garvan*, 1 *Ves.* 160. *Hughes* v. *Hughes*, 1 *Bro. Cha. Rep.* 387. *Andrews* v. *Partington*, 3 *Bro. Cha. Rep.* 60. So a mother married to a second husband is not obliged to maintain her children by her first husband. *Billingsly* v. *Critchet*, 1 *Bro. Cha. Rep.* 268. Nor is the second husband bound to maintain those children. *Tubb* v. *Harrison*, 4 *Durn.* & *East* 118.—*Vide Coomes* v. *Elling*, *post.* 675, 678.

(2) Declared, that no part of the testator's personal estate was undisposed of; "the testator by his will having made a "distribution of all the *rest and residue* "*of his personal estate.*"

(3) "And that the plaintiff should "be at liberty to apply for the surplus "and such interest at his age of 21." *Reg. Lib. A.* 1743. fol. 596.

Crichton versus *Symes*, *June* 22, 1743.

[61]

Case 21.

THE question in this case arose upon the will of *Dorothy Colby*.

A testatrix says, I give to *B.* &c. all my goods, wearing apparel of what nature and kind soever, except my gold watch. *All her wearing apparel and ornaments of her person, except her gold watch, passed to the devisees, and any household goods and furniture, but no other part of her estate.*

The

CRICHTON v. SYMES.

The plaintiffs have brought their bill for the refidue of the teftatrix's perfonal eftate, and found their claim upon thefe words in the will, *I give and bequeath to the plaintiffs all my goods, wearing apparel, of what nature and kind foever, except my gold watch.*

Mr. *Brown* for the plaintiffs' cited the cafe of the *Duke and Dutchefs of Bolton*, and *Newftead* verfus *Johnfon*, before Lord *Hardwicke*, *July* 15, 1740. (1).

The general prefumption he faid was with the plaintiff, for it is not to be prefumed that the teftator died inteftate.

That it is a general devife, and carries the whole refidue, for there is nothing more known than that the word *omnia bona* will convey every thing in the civil law.

Mr. *Browning* of the fame fide cited *Moor* 352. *Portman* verfus *Willis*, and 1 *P. Wms.* 267. *Anon.* both as to the general doctrine of *omnia bona*.

That wearing apparel is only intended for the fake of the exception of the gold watch, and is no revocation of the refidue.

Mr. *Noel* counfel for the defendants, the executor, and *Elizabeth Clark*, the only furviving fifter of the teftatrix, faid, there is no general introductory claufe that fhews her intention of difpofing of her refidue, *as all my worldly goods I intend to difpofe of*, or any fuch general expreffion.

It is difficult to find cafes which correfpond exactly with odd uncertain claufes in wills, yet there are fome where it has been held, *that all my chattels of what nature or kind foever* will not carry the refidue. *Pratt* verfus *Jackfon*, 2 *P. Wms.* 302. *Eq. Caf. Abr.* 200, 201.

It being a woman's will makes it a ftronger cafe for the defendants, for the teftatrix confidered all ornaments as wearing

[62] apparel, fince it is not goods and wearing apparel, *but all my goods, wearing apparel of what nature or kind foever*, which fhews that fhe meant only to give *wearing apparel* and ornaments of the perfon, fuch as jewels, *&c.*

Mr. *Brown* in the reply faid, as to the obfervation that there are no general words which fhew her intention to difpofe of the refidue, it may have weight in the determination of thofe cafes, where there are fuch words, but the law fuppofes that every perfon in making a will intends to difpofe of every thing.

It has been faid, the teftatrix does not mean perfonal eftate in general, but fome fpecies of goods.

But the words *goods of what nature or kind foever* in common parlance means every thing.

That the plaintiffs are the teftatrix's near relations, and that the natural conftruction of the words is all my goods, except my watch.

LORD CHANCELLOR,

Cafes of this kind are feldom very clear.

(1) *Ante* 2 vol. 45. S. C.

The

The reaſoning and arguments to ſhew the intention, ſeem to preponderate in favour of the defendants. CRICHTON v. SYMES.

It has been ſaid the teſtatrix has not ſet out with general words of diſpoſition.

I lay no weight upon that, becauſe all teſtators intend to diſpoſe of the whole; ſhe ſeems to have made an exact calculation of what her perſonal eſtate would amount to, for here is a lapſed legacy of 50 *l.* which taken out of the reſidue, nothing remains but only 16 *l.* ſo that ſhe imagined ſhe had diſpoſed of the whole.

There is no doubt as to the obſervation upon *omnia bona ſua*, that both by the civil law and law of *England* it will paſs the whole.

But what do theſe caſes amount to in general, only, that if a man gives a legacy, and then ſays, I give all my goods, it will paſs the reſidue. But there are inſtances where goods have been taken in a more reſtrained ſenſe.

If a man gives a legacy, and then ſays, I give all my goods, it will paſs the reſidue.

As to what Mr. *Brown* ſays, that in common parlance it means every thing, I take it to be the direct contrary, that they mean goods only, and not the whole perſonal eſtate.

The word *goods* in common parlance means goods only, and not the whole perſonal eſtate.

[63]

This was not intended to be a reſiduary clauſe, for ſhe afterwards gives a legacy of 50 *l.* to the executor.

Indeed if there had been the word *reſidue*, I ſhould have thought it ſtrong for the plaintiff.

It has been inſiſted for the defendants, that the words *wearing apparel* explain the teſtator's meaning, as if ſhe had ſaid all my goods, to wit, my wearing apparel.

But *wearing apparel* muſt be conſtrued the ſame as *and wearing apparel*, and cannot be ſtrained to this ſenſe; for there was no occaſion to introduce wearing apparel in order to except *the gold watch*, for if ſhe had ſaid all my goods, except *my gold watch*, it would have done as well.

All my goods, *wearing apparel*, not to be confined to wearing apparel only, but conſtrued the ſame as *and* wearing apparel.

Therefore I am of opinion, as theſe words ſtand in the will, ſhe intended to give only her *wearing apparel*, ornaments of her perſon, houſhold goods and furniture, but no other part of her perſonal eſtate.

The Houſe of Lords were never clearer than in the caſe of *Pratt* verſus *Jackſon* (*vide* 2 *P. Wms.* 302.) that the words goods related only to the teſtator's houſhold goods and furniture, and did not extend to goods in the way of his trade, or his goods as a contractor for the government. *

* One has a houſe in which he lives, and houſhold goods, and has alſo a houſe at *Goſport* near *Portſmouth*, for invalid ſeamen, with a vaſt number of beds, ſheets and houſhold ſtuff, and by marriage articles it was agreed, that his wife ſhould, on his death, have no claim upon his perſonal eſtate, except his houſhold goods and houſhold ſtuff: this exception to extend only to the goods which he had in the houſe in which he lived, and not to ſuch as were in the hoſpital, and made uſe of by the government. *Pratt* verſus *Jackſon*.

The

Crichton v. Symes.

The testatrix meant here to give not only what was properly clothes, but the ornaments of her person, and the exception of the gold watch shews the latitude of the expression; and what makes this plain is, it being agreed by the parties that 50*l.* which is now the residue, is a lapsed legacy.

His Lordship decreed that all testator's wearing apparel and ornaments of her person, except her gold watch, passed to the plaintiff, and any houshold goods and furniture that she had, but not any part of her estate (1).

(1) With respect to the construction of the word, *goods*, in a will, see the cases of *Anon.* 1 *P. W.* 267. *Ryalle* v. *Rolle*, *ante*, 1 vol. 171. 177. 180, 182. *Chapman* v. *Hart*, 1 *Ves.* 273. *Moore* v. *Moore*, 1 *Bro. Cha. Rep.* 127.

[64] Case 22.

Brookshank versus *Sir William Wentworth*, *June* 23, 1743.

W. devised all his houshold goods, cattle, corn, hay, and implements of husbandry and stock belonging *to his house, messuage, farm and premisses*, he held by lease to his wife for life, a malt-house being included in the lease, the stock of that, as well as the stock in husbandry, will pass by this bequest.

ONE *Wentworth*, who had seventeen years to come in a lease of a farm, malt-house, *&c.* at 40*l.* *per ann.* rent, gives to the plaintiff all his houshold goods, cattle, corn, hay, and implements of husbandry and stock belonging to *his house, messuage, farm and premisses* in the said lease (1), to her for life, if she so long live; but if she should die before the term in it expires, then he surrendered the said lease to the defendant, and makes him his executor.

The plaintiff brings her bill for the stock in husbandry, and likewise the stock in the malt trade.

The defendant insists, that nothing passed by the will but the stock in husbandry only.

Lord Chancellor,

The rent received by the defendant, who was the landlord, must certainly be increased on account of the malt-house, malt-kiln, *&c.* for the repairs are increased by it.

This farm is given by the testator to the plaintiff during her life, and she to pay the whole rent of 40*l.*

It is very unnatural to suppose that this woman was to carry on the business of the farm and to pay the whole rent, and yet not give her the benefit of the malt-house, *&c.* though included in the lease.

But whether natural or unnatural, the words must have their effect.

It is very difficult to find what stock in husbandry the testator had which would not pass by these words, houshold goods, cattle, *&c.* corn, hay, and all implements of husbandry.

Then follows the word *stock*.

(1) And also the said *messuage*, *farm*, *and premises*.

Possibly,

Possibly, if testator had stopped here, it would not have done. BROOKSBANK v. WENTWORTH.

But it goes on and says, belonging to my messuage and dwelling-house, farm and premisses in the said lease.

Therefore it is very absurd to confine the devise to his stock in husbandry, when he has given her all his stock in the house and messuage, farm and premisses comprised in the said lease, and the malt-house is actually part of the premisses.

I am of opinion that both of them were intended to be included in this will. [65]

I think it answers even to the depositions on the part of the defendant.

For they swear, when a farmer speaks of his stock, he means only what belongs to husbandry; but what would they have said, if they had been asked what they thought he meant by stock in the house and messuage, farm and premisses held of the defendant?

These words are certainly explanatory of both stocks.

His Lordship decreed the whole therefore to the plaintiffs (1).

(1) *Reg. Lib. A.* 1743. fol. 594.

Richardson, Administratrix of the Will annexed of Mrs. Westbrook versus *Greese, March* 7, 1743. Case 23.

THE bill was brought to stay execution upon a bond for 260 *l.* and to have it delivered up.

Mrs. *Westbrook* in her will says, "*Item*, I give to my servant "*Jane Greese* 500 *l.* to be paid her within three months after "my death."

W. by a will gives to her servant *G.* 500 *l.* to be paid her within *three months* after *W.*'s death; and in another part says, I give 5 *l.* a-piece to the rest of my servants, *but not to G. because I have done very well for her before.* And by a latter clause gives her lands in trust to pay her debts and legacies. *W.* at her death owed *G.* 260 *l.* on bond. *On the circumstance of this will there is sufficient to take away the presumption, that the legacy was given in satisfaction of the debt* (1).

In another part she says, "I give five pounds a-piece to the "rest of my servants, but I do not give five pounds to the said "*Jane Greese*, because I have done very well for her before."

By another clause "she gives her lands lying in different "parishes in trust by mortgage, or sale, or otherwise, to pay "her debts and legacies, and after debts and legacies are paid "then, *&c.*"

Mr. Attorney General, counsel for the plaintiff, laid it down as a rule of this court, that where the legacy exceeds, or is equal to the debt, it has been held to be an ademption.

(1) See *Nicholls* v. *Judson*, *ante* 2 vol. 300. *Bellasis* v. *Uthwat*, *ante* 1 vol. 426, and note.

Mrs.

RICHARDSON v. GREESE.

Mrs. *Westbrook* died in *January* 1735, and the legacy was paid to *Jane Greese* the 18th of *April* 1737, who lived two years after, but never thought of bringing an action upon the bond. He cited *Fowler* versus *Fowler* (1), the 18th of *May* 1735, before Lord *Talbot*, who said there that no particular affection should be a ground to alter the general rule of the court.

[66] Mrs. *Greese* was only a servant in the family of Mrs. *Westbrooke*, and there are several cases much stronger, where legacies have been given to a wife or children who were creditors upon the estate of the testator, and yet held to be a satisfaction.

LORD CHANCELLOR,

The rule is to be sure as laid down by Mr. Attorney General, and therefore incumbent on the other side to shew, how this case is distinguishable from it.

Mr. *Brown* for the defendant stated, that Mrs. *Westbrooke* being ill of the small-pox, Mrs. *Greese*, who had never had it, attended her during that illness at the hazard of her own life, and was upon this account in such esteem with the testatrix, that she constantly dined with her afterwards, and was treated in every respect as a friend and companion.

Lord Chancellor prevented the defendant from going into evidence of this fact, because he thought it ought to have no weight with the court.

Mr. *Brown* laid a stress upon interest being paid by the representative of Mrs. *Westbrooke* on the bond to Mrs. *Greese*, and on the legacy's being given just before the death of the legatee.

He insisted that the legacy was given entirely as independent of the bond, and as a reward for her extraordinary services.

But exclusive of these circumstances, he submitted on the face of the will the defendant was intitled both to the bond and legacy.

He allowed the generality of the rule as laid down by the Attorney General, but said if it was to be examined into, arguments might be used to shew it's absurdity; for it sounds a little oddly that if the testator owes 100 *l.* to *A.* and gives a legacy of 100 *l.* *A.* shall have nothing, and yet if he leaves 100 *l.* to *B.* to whom he owes nothing, *B.* shall have the legacy of 100 *l.*

After debts and funeral expences paid, then I give, &c.

Seems calculated to shew that she intended both debts and legacies should be paid, which is something particular and different from the common form of wills.

A precaution taken that debts and legacies should be paid, and likewise a precaution that no more than the legacy of 500 *l.* should be paid, for the testatrix precludes her from the 5 *l.* given to the rest of the servants.

He cited *Chauncy*'s case, 1 *P. Wms.* 408, which comes very near the present.

(1) 3 *P. W.* 353. S. C.

To

RICHARDSON v. GREESE.

To conſtrue it a ſatisfaction of the legacy would be to reject very material words, *viz. after the payment of my debts, &c. Atkinſon* verſus *Webb*, 2 *Vern.* 478.

It is a rule, where a legacy is given chargeable upon land, it is not due unleſs the perſon lives to the time it becomes payable.

Urged this as an argument to ſhew that this legacy was ſubject to an accident, and a contingency, and therefore could not be in ſatisfaction of a debt, unleſs it had been certain, and a legacy veſted, and abſolutely in the legatee upon the death of the teſtator.

Mr. *Mariot* of the ſame ſide cited *Graves* verſus *Boyle* (1), *July* 27, 1739, before Lord *Hardwicke* on Sir *Samuel Garth*'s will, where his Lordſhip ſaid he would not extend the rule of ſatisfaction farther than it has gone before, and that an intention of a teſtator ſhould co-operate with the rule, and 2 *Vern.* 270. in Lord *Somers*'s time, and *Salk.* 508. *Cranmore*'s caſe in Lord *Harcourt*'s time; and *Crompton* verſus *Sale*, 2 *P. Wms.* 553. *Eq. Caſ. Abr.* 206.

Mrs. *Greeſe* lived a ſervant between 20 and 30 years with the teſtatrix, ſo that her wages upon a reaſonable allowance muſt amount to 260*l.* the ſum for which the bond was given.

The teſtatrix does not give Mrs. *Greeſe* 5*l.* becauſe ſhe had already done very well for her, which is a circumſtance at leaſt to ſhew, that ſhe intended her the 500*l.* excluſive of the bond.

The bond, beſides, was executed but a month before the making of the will, ſo that ſhe could not poſſibly be thought to have forgotten the bond.

Mr. Attorney General in reply ſaid, there muſt be ſome reaſonable, ſolid rule in theſe caſes, or elſe nothing would be ſo precarious as this kind of property.

As to teſtatrix's expreſſion *after debts and funeral expences*, it will not weigh with your Lordſhip, for where the law would have done it if not expreſſed, *nihil operatur.*

As to the obſervation, upon the exception of the 5*l.* legacy, it was a ſhorter way of doing it than to have named every one of her ſervants, and was merely to ſave time and trouble.

As to the latter words, *becauſe I have done very well for her before*, means no more than that ſhe had been bountiful to her already, which ſhe might be very well ſaid to be even after the 260*l.* was deducted. [68]

LORD CHANCELLOR,

The general rule of ademption is too well eſtabliſhed to be diſputed, and it is admitted that where a legacy either exceeds the debt, or is equal to it, that is, where there is a debt due in the teſtator's life-time, and nothing but a plain general legacy given to the creditor, it ſhall prevail.

The rule of ademption, by length of time, is become the fixed rule of property, and too well eſtabliſhed to be diſputed now; but if the maxim *debitur non præſumitur donare* was to be reconſidered, it would not hold.

(1) *Ante* 1 vol. 509.

Length

Length of time will not suffer it to be shaken now, as it is become the fixed rule of property, and yet the maxim *debitur non præsumitur donare* would not hold if it was to be reconsidered, for the court have always shewn some dissatisfaction at the rule, and endeavour, if there is any room to do it, to distinguish cases out of it.

The court, tho' they will not break the rule, have frequently said, they will not go one jot further.

They have said indeed they would not break the rule, but at the same time have said, they would not go one jot further, and have been fond of distinguishing cases since, if possible.

Distinctions from the rule must arise from the circumstances in the will, and not of the legatee.

But then these distinctions are not to be taken from particular circumstances of the legatee *dehors* the will, such as relationship, affection, services, &c. unless they are to be found in the will itself.

This brings it to the question, whether there are such circumstances in the present will.

I am of opinion there are sufficient here, to take away the presumption that the legacy was given in satisfaction of the debt.

The words here, *after debts and legacies are paid, then I give*, &c. are much stronger than in *Chancey*'s case, before Lord Chancellor *King*, "that all his debts and legacies should be paid." 1 *P. Wms*. 408. 410.

As for the worldly goods and estate wherewith it hath pleased God to bless me, after my debts and funeral expences are discharged, I give, &c.

What does this import? why, that after her debts, &c. were paid, she intended to dispose of the whole real and personal estate.

[69] Here the legacy given to *Jane Greese* is at some distance after other legacies; but suppose it had immediately followed, or suppose it had been the only legacy, would any body have said this was a satisfaction? There is no difference whether it is placed first or last in the will, whether it is the only legacy, or in company with other legacies.

The words *because I have done very well for her before*, imply, that what she had given her before was meant a bounty, and not a satisfaction.

But I think there is a stronger distinction still from the common cases. The testatrix says, *Jane Greese* shall not have 5 *l*. because I have done very well for her before; these words appear to me to be a declaration, that what she had given her before, she intended her as a bounty merely, and not as a satisfaction.

It would be too much for a court of justice to make those nice distinctions as to the *quantum* of the bounty of the testator, which Mr. Attorney General has attempted, by saying the testatrix intended no further bounty than 240 *l*. after the 260 *l*. paid.

The 500*l*. to G. equally a reward for her services as the 5 *l*. to the other servants, and legacies to servants have never been construed a satisfaction for debts.

I do not rest it upon this foot only, but look upon these words to intimate the testator meant the five hundred pounds to be

equally

equally a reward for *Jane Greese*'s services, as the five pounds was for the other servants; and legacies to servants have never been held to be in satisfaction of debts. RICHARDSON v. GREESE.

She excludes *Jane Greese* from the five pounds legacy, because she has done very well for her before.

Neither is the argument, that it is not to be paid in three months, to be thrown intirely out of the case, and if it had been charged upon real estate only, and not at all chargeable upon the personal estate, I should have thought it of greater weight; for would not the possibility and contingency of legatees dying before the legacy became payable have been taken into consideration, as the legacy might not have been payable at all if the legatee had died before the three months: and held so in several cases, one to this purpose was in Lord *Somers*'s time. *Yates* v. *Fettiplace*, 2 *Vern.* 416.

Where a legacy is charged upon a mixed fund of personal and real estate, if the personal assets are sufficient the legacy is payable, though the legatee die before the day of payment, otherwise if the legacy was out of a real estate only (1).

A legacy chargeable on a mixed fund, if personal assets are sufficient, is payable though the legatee die before the day of payment, otherwise on real estate only.

Upon all these circumstances I am of opinion here is enough to take it out of the common rule, and that this legacy is not to go in satisfaction of the debt.

His Lordship decreed that the plaintiff should pay the defendant the principal and interest due on the bond in six weeks, and to be without costs; but if the plaintiff should not pay it in that time, the defendant was to be left at liberty to apply for costs. [70]

(1) See *Prowse* v. *Abingdon*, *ante* 1 vol. 482. *Hall* v. *Terry*, *ante* 1 vol. 502. *Van* v. *Clark*, *ante* 1 vol. 512. *Attorney General* v. *Milner*, *post*. 112. Mr. *Cox*'s note to 2 *P. W.* 612. *Butl. Co. Litt.* 237.

Pleas and Demurrers, March 14, 1743. Case 24.

THE bill was brought for an account.

The defendant put in a plea of a stated account as to all matters herein *before accounted for*.

LORD CHANCELLOR,

It is bad, because the defendant, as to any errors charged in the account, might by such a plea effectually defend himself against the discovery of any error by saying only it was *before accounted for*.

A plea of a stated account as to all matters *before accounted for*, is bad, it should aver, that it is just and true to the best of the defendant's knowledge and belief.

PLEAS AND DEMURRERS. Pleading to all except such parts of the bill *as are not herein after answered*, is too general.

He must aver that the stated account is just and true to the best of his knowledge and belief. So where a defendant pleads generally to all except such parts of the bill as are not *herein after answered*, is likewise bad, because it is too general (1); you must be more explicit as to what you plead to the bill.

(1) *Vide Salkeld* v. *Science*, 2 *Vef.* 107. *Anon.* the next case.

Case 25.

March 14, 1743.

A bill brought by a creditor of an intestate for 100*l.* on note, charging that the administratrix promised to pay it, as soon as she could get in effects, to which she pleaded the statute of limitations, and that she made no promise to pay the note, *too general, for she should have pleaded she made no promise to pay out of assets.*

A Plea of the statute of limitations by an administratrix to a note for 100*l.* The bill charges that since the death of the intestate who gave this note, the administratrix promised to pay it as soon as she could get in effects of the intestate to discharge it.

The plea is general, that the defendant made no promise to pay the note.

LORD CHANCELLOR,

As there is a particular and special promise charged, the plea here is too general (1); the defendant should have pleaded that she made no promise to pay out of assets, and therefore it must stand for an answer, with liberty to except.

[71]

If principal be barred, so is interest.

If the principal is barred, the interest is so likewise.

A plea of the statute of limitations must say, *the cause of action hath not accrued within the six years*, that the defendant hath not promised to pay within six years, is bad.

Where a note is given for the payment of an annuity of six pounds *per annum* during the life of the annuitant, the defendant pleading that he did not promise to pay within six years is bad, he should have pleaded the cause of action hath not accrued within the six years.

So where a note is given for payment of money three years from the date, and an action is brought.

That the defendant has not promised to pay is bad, because it is executory, and therefore it should have been that the cause of action hath not accrued.

So where a note is given to pay 100*l.* by installments.

That defendant hath not promised to pay is bad, because the statute of limitations bars only what was actually due, six years before the action brought.

(1) See the preceding case.

Pearson versus *Brereton*, *March* 16, 1743. Case 26.

A Petition was preferred in behalf of *Pearson* and *Mary* his wife, that 860*l.* left under a will to persons in trust *for Mary and her heirs, to be laid out in the purchase of lands* might be paid to the husband, instead of being invested in land.

860*l.* left by will in trust for *M.* and her heirs, to be laid out in the purchase of lands. *M.* consenting in court Lord *Hardwicke* directed the money should be paid to the husband.

LORD CHANCELLOR,

I doubt whether I can direct the money to be paid to the husband notwithstanding the wife's consent, because the heir would have a chance, if the wife died before the money was invested in land.

But upon the authority of a case at the *Rolls*, directed (the wife consenting in court) that the money should be paid to the husband (1).

Nota; Mr. *Brown*, the king's counsel, told me, that in a petition this time twelvemonth upon the very same question Lord *Hardwicke* would not direct the money to be paid to the husband but dismissed the petition.

N. B. A petition on the very same question a twelvemonth ago, was dismissed.

(1) *Reg. Lib. B.* 1743. *fol.* 264. *Oldham* v. *Hughes*, *ante* 2. vol. 454. note.

[72]

Beard versus *Beard*, *April* 5, 1744. Case 27.

THE plaintiff's husband, a freeman of *London*, being at variance with his wife, in *January* 1739, by his will executed at a tavern, gives all his estate real and personal to his brother, and makes him his executor.

In *November* 1740, by *a deed poll*, he gives and grants unto his wife all his substance which he now has, or may hereafter have.

The bill was brought by the wife who insists upon the *deed poll*, and that the will is revoked by this subsequent act of the husband in his life-time.

The counsel for the plaintiff cited *Boughton* versus *Boughton*, the 5*th* of *December* 1739. 1 *T. Atk.* 625. and *Harvey* versus *Harvey*, *November* the 12*th* 1739. *Vide* 1 *T. Atk.* 561.

B. by a will in 1739, gives all his estate real and personal to his brother, and makes him executor; in 1740, *by a deed poll* he grants to his wife all his substance *which he now has, or hereafter may have.* The *will was revoked as to all the personal estate by the deed poll; but as it cannot operate as a grant of it to the wife, the personal estate must be distributed.*

LORD CHANCELLOR.

A man here has done two very unreasonable acts; if it should happen one trips up the heels of the other, it is a very fortunate thing to set every thing right again.

A wife appears here to be unprovided for, both before and after marriage.

A will is made at a tavern, probably in a passion, for the husband was parted from his wife at that time, by which he gives his whole estate to his brother.

BEARD v. BEARD.

Afterwards he is guilty of another unreasonable act, a gift to his wife by *deed poll* of all his substance.

The question is which is to take effect.

A man cannot make a grant to the wife in his life-time, being contrary to law, nor will this court suffer her to have the whole of his estate whilst he is living.

The latter cannot take effect as a grant or deed of gift to the wife, because the law will not permit a man to make a grant or conveyance to the wife in his life-time, neither will this court suffer the wife to have the whole of the husband's estate while he is living, for it is not in the nature of a provision, which is all the wife is intitled to. (1).

But then another consideration remains, that though it can not take effect as a grant to the wife, yet whether this is not an act so inconsistent and repugnant to the will, that it may amount to a revocation, though an act not strictly legal.

[73]

An incomplete act, and void at law, has in this court been held a revocation of a will.

There are several instances in this court where an incomplete act, and void at law, has been held here to be a revocation of a will notwithstanding, as a *feoffment without livery*, *&c.* (2).

It has been said, this will is proved and established in the ecclesiastical court, and therefore must be considered as a will.

Tho' the deed poll was a revocation of the legacies, yet, the executor continuing, the will must be proved, but is become a trustee for the next of kin.

To be sure the ecclesiastical court could not do otherwise, for tho' this deed is a revocation of the legacies under the will, yet the executor continuing, it must be proved in the commons. But by this alteration in the disposition of the personal estate, the executor becomes a trustee for the next of kin.

The next question is upon the construction of the 11 *Geo.* 1. *sec.* 17, 18. in respect to the custom of *London*.

Where there is an intestacy, the law knows no difference between an absolute and a qualified one.

If this is an intestacy, it is admitted by the defendant's counsel it must be distributed; but they have insisted here is a will, which, as it is proved, must stand, and therefore there is no intestacy at least of the personal estate; but if there is an intestacy at all, there is no difference in point of law between an absolute, and a qualified intestacy.

The executor must in this case distribute according to the custom of *London* as the testator was a freeman.

This being the rule; the executor, who from this qualified intestacy is now become a trustee, must distribute in this case according to the custom of the city of *London*; and his Lordship decreed accordingly.

He declared likewise that the will was revoked as to all the personal estate by *the deed poll*, and yet it cannot take effect as a gift or grant of such personal estate to the plaintiff, but the said personal estate must be distributed.

(1) *Vide Lucas* v. *Lucas*, *ante* 1 vol. 270. *Watkyns* v. *Watkyns*, *ante* 2 vol. 97. and note. *Stott* v. *Ayloff*, 1. *Cha. Rep.* 60.

(2) Vide *Parsons* v. *Freeman*, *post* 741. *Sparrow* v. *Hardcastle*, *post* 803.

Car versus *Ellison*, *April* 6, 1744. Case 28.

WILLIAM Car, by will dated in *July*, 1732, says, "I "order all my debts to be paid and payable out of all my "real estate as hereafter mentioned, and I hereby charge the "same with payment thereof, and my mind and will is, that "all my personal estate shall be freed and discharged from my "debts, *and I give and devise all my messuages, lands, tenements* "*and hereditaments in St. Helen's, Auckland, and elsewhere in the* "*county of Durham, and all other my real estate*, unto Sir* *Ralph* "*Milbank* and —— *Hedworth*, and to their executors and ad-"ministrators, for and during the term of five hundred years, "upon trusts hereafter mentioned; and after the determina-"tion of the said term, *I give all the premisses unto my dearly* "*beloved wife for and during her natural life, without impeachment* "*of waste.*"

S.C. cited ante 1 vol. 559. C. gives all his messuages, lands, tenements and hereditaments in *St Helen's, Auckland*, and elsewhere in the county of *Durham, and all other his real estate* to trustees, &c. for 500 years for particular purposes, and after the determination of the term, *gives all the premisses* to his wife for her life, without impeachment of waste. *All the estates coming originally from the wife, the testator could not mean to sever the copyhold from the freehold, therefore by the general words of the will the copyhold lands passed.*

Mr. Solicitor General for the widow of Mr. *Car*, the plaintiff in the cause, submitted that a devise of a copyhold estate without a surrender, where the devisor had only the equitable interest, and the legal in trustees, is sufficient to pass the copyhold. [*74]

And also, that the testator in this case could devise the copyhold to whomsoever he pleased, without any surrender, and that there is such a consideration as this court thinks a valuable one, and sufficient to supply the want of the surrender.

To shew that the copyhold passed by these general words, he cited 2 *Vern. Greenhill* versus *Greenhill* 679.

He stated, that under the settlement on the marriage of the testator with the plaintiff, the uses of the real estate passed by the fine that was afterwards levied: that there was likewise a surrender of the copyhold estate in five different surrenders, but all annexed together; and that there was no declaration of the uses in the court roll, but indorsed only on the back of the last, and that they were surrendred and signed by the steward of the court, without any of the parties' names to it.

A doubt, he said, had been made whether this was regular.

Lord Chancellor held this was sufficient, and that there is no occasion to specify the uses in the court rolls, but the surrender generally would do, without being more explicit, than by this indorsement of the uses by the steward.

A steward's indorsing on a surrender of a copyhold the uses of it sufficient, without specifying them in the court rolls.

Mr. *Brown* counsel of the same side said, that the words are so comprehensive they must take in copyhold, or else after he had used such words as would undoubtedly have passed his freehold estate, why should he superadd *all other my real estate*, but with an intention to pass the copyhold likewise.

Car v. Ellison,

He stated the case more at large of *Greenhill* versus *Greenhill* out of *Prec. in Eq.* 320.

Lord Chancellor asked whether Mr. *Car* had any other real estate besides what he had in *Durham* and *Newcastle*, and it was admitted he had in other counties.

[75] Mr. *Craster* of the same side cited *Andrews* and *Waller*, *Hil.* 6 *Geo.* 2. 1733. *Vide Viner's Abr.* title *Copyhold*, *p.* 237. *s.* 12.

Mr. Attorney General for the defendant, the heir at law, cited the case of *Harwood* versus *Child*, *Aug.* 13, 1734, and *Elwell* v. *Polhill*, heard before Lord *Hardwicke June* 10, 1738.

The words there were *all other his lands tenements and hereditaments* in *Somersetshire*; and yet it was held that these words would not pass the copyhold; and upon a reference to a master to see whether the testator had lands in any other county, he reported the testator had no other estate; and the court notwithstanding determined that the copyhold lands would not pass.

Mr. *Owen* of the same side argued, that the testator by giving each tenant for life an estate without impeachment of waste, and a power of leasing for 21 years, shews he meant only freehold, for he could not give the devisees such privilege over copyhold estates, for it would be a detriment to the lord of the manor of whom the copyhold lands are holden.

And insisted that there was no instance of devising a copyhold upon a term of 500 years for paying debts by mortgaging, or otherwise, for a copyhold upon a mortgage must be surrendered, which is the only method of conveying a copyhold; and therefore this likewise is a circumstance to shew he meant only freehold lands, to which these powers and privileges can only be annexed.

Lord Chancellor,

I am of opinion the trust of these copyhold estates will pass without a surrender to the uses of the will; there have been several cases so determined, but particularly *Tuffnal* versus *Page*, *Easter* term 1740. (1).

A person who has the beneficial interest only in copyhold estates, may devise them, and they pass by his will as well as any other lands, for he could not surrender them without having the legal estate.

Because the surrender must be by the person who has the legal estate; and when there is no legal esta e in the party who has the beneficial interest, it may pass by a will as well as any other lands.

This being out of the case, the next question is, Whether here is a sufficient indication of the testator's intention that the trustees should have the copyhold as well as the real estate.

As to this, the words of the will and the nature of the case must determine.

(1) *Ante* 2 vol. 37. S. C. *King* v. *King*, 3. *P. W.* 360. *Macey* v. *Shurmer*, ante 1 vol. 390. *Allen* v. *Poulton*, 1. *Ves.* 121. *Macnamara* v. *Jones*, 1 *Bro. Cha. Rep.* 481.

There

There is no dispute but the words are large enough to pass the copyhold lands; there cannot possibly be larger to pass any real interest a testator had in lands, than *all other my real estate*. (1). CAR v. ELLISON.

The words then being large enough, the next question is, Whether it appears to be the intention of the testator they should pass. [76]

The real estate was originally the inheritance of the wife, consisting of part freehold and part copyhold.

Upon the marriage the freehold lands were by settlement conveyed, and by the fine of the husband and wife to Sir *Ralph Milbank* and —— *Hedworth*, in trust for the husband and wife during their joint lives, and the survivor, with remainder to the heirs of their two bodies, remainder in fee to the husband and his heirs.

Mr. *Car* and his wife likewise made a surrender of the copyhold lands to the same trustees, and for the same purposes with the freehold lands.

After this the husband makes his will.

What appears to be the intention?

Why, as the wife had been so generous as to give the remainder in fee to him, he was willing to return the compliment to her, but *sub modo*, and qualified with a charge for payment of debts, and so limited that all her children by any future husband might take in strict settlement.

It cannot be presumed that the testator intended to sever the copyhold which came at the same time with the freehold, and therefore this is a strong circumstance to indicate the testator's intention; and to construe it otherwise would be to dismember the estate, which could never be meant, when he devises them to the same trustees as were under the settlement.

The objections deserve to be considered.

That giving each tenant for life an estate without impeachment of waste is not applicable to copyhold.

But in such a comprehensive will as this is, it is not necessary to lay such stress upon the words *without impeachment of waste*, and they may be looked upon as surplusage with regard to the copyhold estates.

For in settlements of great family estates it frequently happens that real and copyhold estates lie blended and intermingled together.

The lord is not bound indeed to admit a tenant according to the express terms of the trust, where contrary to the form of a legal conveyance. But the security of the lord is admitting a trustee to the inheritance, by which the fines, heriots, escheats, &c. are fully secured to him. [77]

Cases have been mentioned on both sides.

But it is very difficult to make cases tally exactly, because circumstances are material in these cases.

(1) *Vide Smith* v. *Baker*, *ante* 1 vol. 386. *note*.

 It

CAR v. ELLISON.

The court will supply a surrender of a copyhold where there is a charge upon it for payment of debts (1).

It has been determined in this court that where there is a charge for payment of debts on copyholds, and no surrender, yet the court will supply it. The case of *Elwell* versus *Polhill* was only a copyhold for three lives, and not of inheritance, which was the reason of the decree there.

The material circumstance here, is the intention of the testator to restore the estates to the wife, from whom they originally came, and therefore he could not mean to dismember and sever the copyhold estate from the freehold. His Lordship decreed the copyhold land passed to the trustees by the general words of the will.

(1) See note 2, to 3 *Cox's P. W.* 98. To which note add the cases of *Lindopp* v. *Eboral*, 3 *Bro. Cha. Rep.* 188, and *Kentish* v. *Kentish*, *ibid.* 257.

Case 29. *Rosewell* versus *Bennett*, *April* 17, 1744.

B. by his will gives all his real and personal estate equally among his children; and, at the conclusion of it, directs his executor to lay out a sum not exceeding 300*l.* in putting out the defendant, his son, apprentice.

B. in his life-time lays out 200*l.* in putting out the defendant clerk to a person in the navy office, and dies without revoking his will. Evidence allowed to be read of the testator's declarations that this advancement should be an ademption of the legacy (1).

THE defendant's father, by his will, "devises all his "real and personal estate equally among his children; "and, in the conclusion of his will, directs his executor to lay "out a sum not exceeding 300*l.* in putting out the defendant "apprentice."

The testator in his life-time lays out 200*l.* in putting out the defendant clerk to a person in the navy office, and dies without revoking his will.

It was insisted for the plaintiff, this must be considered as an ademption of the legacy, and offered to read evidence of the testator's declarations to this purpose.

It was opposed by the defendant's counsel, as being contrary to the statute of frauds and perjuries, and that no weight ought to be laid upon it, being parol declarations only; and besides, the father suffering his will to stand unaltered, is a favourable circumstance for the defendant.

(1) In the following cases *evidence* of the intention was admitted. *Chapman* v. *Salt*, 2 *Vern.* 646. *Pile* v. *Pile*, 1 *Cha. Rep.* 199. *Shudal* v. *Jekyl*, *ante* 2 vol. 518. *Biggleston* v. *Grubb*, *ante* 2 vol. 48. *Mascal* v. *Mascal*, 1 *Ves.* 323. *Ellison* v. *Cookson*, 2 *Bro. Cha. Rep.* 307. 3 *Bro. Cha. Rep.* 61. S. C. In *Jeacock* v. *Falkner*, 1 *Bro. Cha. Rep.* 296. Lord *Thurlow* said, that evidence could not be read to prove, what the testator meant by the *words* used in his will, but it might as to *facts*, upon which the testator made his will. As to the general doctrine of Satisfaction, see *Bellasis* v. *Uthwatt*, *ante* 1 vol. 426, note 2.

ROSEWELL v. BENNET.

LORD CHANCELLOR,

I am of opinion this evidence ought to be read, and ſhall judge of the weight of it afterwards.

The putting out a ſon clerk in any of the offices, is as much an advancement, as putting him apprentice to a trade; and as this act of the teſtator after making his will, is not a revocation of the will, but an ademption only of the defendant's legacy; I am of opinion the plaintiff ought to be let into this evidence, to ſhew the teſtator's intention, and it has been done in ſeveral caſes; one before Lord *King*, one before Sir *Joſeph Jekyll*, and another before Me, upon an appeal from a decree of Sir *Thomas Abney*'s at the Rolls.

Pain verſus *Benſon and Palmer*, *April* 23, 1744. Caſe 30.

T. B. by his will appoints the intereſt that ſhall be made of his perſonal eſtate to be paid to his father during his life, and after his deceaſe, to his mother for her life, and after their deceaſe, gives the reſidue of his perſonal eſtate to his brother and ſiſters, and to the ſiſters of his late wife *Martha* and *Rebecca Pain*, ſhare and ſhare alike; and then ſays, in caſe of the death of my brother, or any of my ſiſters, or wife's ſiſters, *before me, or the ſurvivor of my father and mother*, I appoint his, her, or their ſhares to be divided among the ſurvivors.

The brother died in the teſtator's life-time, but after the will was made, and his ſiſters in the life-time of the teſtator's mother, who ſurvived her huſband, but is ſince dead. *Martha and Rebecca Pain* claim the reſidue of *T. B.*'s perſonal eſtate. *They are intitled, as the only ſurviving legatees at the death of the ſurvivor of the teſtator's father and mother, to the whole reſidue of T. B.'s eſtate, to the accumulated ſhare of the perſons who are dead, as well as their original fifth* (1).

THOMAS *Bellaſis*, *September* 14, 1721, made his will as follows: I appoint all ſuch intereſt as ſhall be made upon my perſonal eſtate ſhall be paid to my father *Thomas Bellaſis*, during his life, and to my mother Mrs. *Elizabeth Bellaſis* after his deceaſe, in caſe ſhe ſhall ſurvive him, during her life, for their reſpective uſes; and after the deceaſe of my father and mother, I give all the reſidue of my ſaid perſonal eſtate and effects to my brother and ſiſters *Charles*, *Mary* and *Elizabeth Bellaſis*, and the ſiſters of my dearly beloved wife deceaſed, *Martha Pain*, and *Rebecca Pain* (the plaintiffs) to be equally divided amongſt them, ſhare and ſhare alike; *and in caſe of the death of my brother, or any of my ſiſters, or wife's ſiſters, before me, or the ſurvivor of my father and mother, I do appoint his, her, or their ſhares to be divided amongſt the ſurvivors of them.*

The teſtator died in 1722, without revoking his will.

Charles Bellaſis died in the teſtator's life-time, but after the making of the will, *Mary* and *Elizabeth*, the teſtator's ſiſters, died in the life-time of the teſtator's mother, who ſurvived her huſband, but is dead ſince.

The bill is brought by *Martha* and *Rebecca Pain*, againſt the defendant *Benſon* (the conſignee of the money ariſing from the teſtator's perſonal eſtate) for the reſidue of the ſaid eſtate, and that the ſame may be paid to them. [79]

It was inſiſted by the Attorney General for the plaintiffs, that as they were the only ſurviving legatees at the death of the ſurvivor of teſtator's father and mother, that they are the only

(1) So *Worlidge* v. *Churchill*, 3 *Bro. Cha. Rep.* 465.

Pain v. Benson. persons intitled to the whole residue of the testator's estate, as well the original as accumulated share.

The counsel for the defendant *Charles Palmer* insisted, that on the death of *Charles Bellasis*, *Mary Bellasis*, and his late wife *Elizabeth Bellasis*, became intitled by virtue of, and under the said will, each of them to one fourth part or share of the said *Charles Bellasis*, of and in the balance remaining in *Benson*'s hands; and that on the decease of *Mary*, who died intestate in the life-time of the defendant's late wife; the said *Elizabeth* became intitled under the said will to one third part of the original part or share of her said sister *Mary*, of the said personal estate; and that, on the said *Mary*'s death, the defendant's said wife, and the testator's mother, as only sister and mother of *Mary*, became also intitled by the statute of distributions of intestate's estates, each of them to a moiety of *Mary*'s fourth part, or share of the original fifth part or share of the said *Charles*, of the said testator's personal estate: That he having taken out administration to his wife, is intitled to the several parts or shares of testator's personal estate whereto his wife *Elizabeth* became intitled, on the respective deceases of *Charles* and *Mary*.

For the defendant were cited *Barnes* versus *Ballard*, (1), 1 *Geo.* 1, 1728, on the first of *June*, before Lord *King*, "there "was a devise to four children of 500 *l.* a-piece at eighteen, or "day of marriage; and in case any of the children die before "the age of eighteen, or marriage, then to the survivors, or "survivor of such survivors; one of the children died a minor, "and then it survived to three; another afterwards died a "minor; and the question was, whether the share that came "by survivorship to the last deceased minor, should, upon the "minor's death, survive again; and held, it should not; it "came before Lord *Hardwicke* in 1740, and this point ac"quiesced in." *Perkins* versus *Micklethwait*, 1 *P. Wms.* 274. 2 *Cha. Rep.* 131. *Rudge* versus *Barker*, *Tr. Term* 1735, before Sir *Joseph Jekyll*. *Cas. in the time of Lord Talbot*, 124.

It stood over till the last day of causes in the term, and then, being *May* the 5th, 1744, his Lordship gave judgment.

[80] Lord Chancellor,

A bill is brought to have an account of the residue of the personal estate of *Thomas Bellasis*, and that it may be paid to the plaintiffs.

The principal defendant is *Charles Palmer*, who married *Elizabeth Bellasis*, one of the testator's sisters.

The question is, whether the whole accumulated share of the persons who are dead, as well as the original fifth, doth go over to the survivors at the death of the surviors of father and mother of the testator.

I am of opinion, that not only the original share in the *residuum* of the personal estate does survive, but the accumulated

(1) S. C. cited, *Ca. temp. Talb.* 125.

share

share survives likewise; and I found my opinion on the particular penning of this will. Pain v. Benson.

It has been insisted, that it is not subject to any new survivorship; and I do agree this is the general rule.

As where a man gives a sum, suppose of 1000*l.* to be divided amongst four persons, as tenants in common, and that if one of them die before twenty-one, or marriage, that it shall survive to the other; if one dies, and three are living, the share of that one so dying, will survive to the other three; but if a second dies, nothing will survive to the remainders but the second's original share, for the accruing share is as a new legacy, and there is no further survivorship (1).

A. gives 1000*l.* amongst four persons as tenants in common, and directs if one of them die before 21, or marriage, it shall survive to the other; if one dies, his share will survive to the other three; but if a second dies, nothing will survive but his *original* share, for the accruing share was as a new legacy.

Barnes versus *Ballard*, and the rest of the cases cited for the defendant, are all of this general kind.

If this had been like those cases, and the penning of the will had warranted it, I should have been of the same opinion.

By the will he says, "and in case of the death of my brother, or any of my sisters, or wife's sisters, before me, or the survivor of my father and mother, I do appoint his, her, or their shares, to be divided amongst the survivors of them.

What is the effect of this clause?

Here is an express direction, that if any should die before the testator, it should survive to the others.

One of them died, and therefore his share did go to the survivors. [81]

And if it had not been for this clause of survivorship, to take place before the death of the testator, this would not have survived at all, but must have been considered as an undisposed part of the testator's personal estate.

Then I will suppose another had died in the testator's lifetime.

Would the original fifth of him, who died second in the lifetime of the testator, have gone over, and the share which survived to him upon the death of the first, have gone over likewise?

Undoubtedly both.

Then what is the consequence arising from this? Why, that the testator meant, not only the original, but likewise the accumulated share should go over.

Then the question is, Whether I can put a different construction on the word *share* in one case than the other?

There is no doubt, but a man may make his will so, that whatever he gives originally to tenants in common, and what

A will may be so made, that what is originally given, and what accrues by others deaths, shall go to the survivors

(1) So *Burgrave* v. *Whitwick*, 2 *Cha. Rep.* 131. *Perkins* v. *Micklethwaite*, 1 *P. W.* 275. *Rudge* v. *Barker*, *Ca. temp. Talb.* 124. *Ex parte West*, 1 *Bro. Cha. Rep.* 575.

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shall likewise accrue to them by the death of others, shall go to the survivors.

Then the question is, whether the testator here has not expressed such intention?

I am of opinion he has plainly done so: and, indeed, the meaning of this testator was, that the residue of his personal estate should go amongst such persons as should be living at the death of his father and mother.

The intention of testators in these cases is to prevent any thing going to strangers, so that former determinations are contrary to their intention, tho' consistent with rules of law.

I am more inclinable to make this construction, because I much question, whether the determination of former cases has not been contrary to the intention of the testator, though consistent with rules of law: for the intention of testators is, to prevent any part from going to strangers, for whom they had no kindness, and could not be supposed to have in their view at the time.

[82]

But the rule is now settled, and I do not vary it in the present case, because I am of opinion, that here are express words which shew the testator meant not only the original gift to the legatees, but what accrued likewise by the deaths of those persons, should go to the survivors.

And therefore his Lordship decreed an account of the residue, and that the whole should be paid to the plaintiffs (1).

(1) *Reg. Lib. B.* 1743. fol. 363.

Case 31. *Norris* versus *Le Neve*, *April* 28, 1744.

S. C. ante 26. Semb. A nominal manor will pass under the general words messuages, lands, tenements, and hereditaments.

THE commissioners who had been appointed to settle the boundaries between the parties, and for separating freehold and copyhold, certified to the Chancellor a doubt they had, whether a manor was included under the words *lands*, *tenements*, *and hereditaments*, in the conveyances of old *Oliver Le Neve*.

LORD CHANCELLOR,

There is no question, but a manor may pass by the word *hereditaments*.

The question then will be, Whether it will pass as it is placed in these two conveyances?

In the first deed are these words, "also all those messuages, "lands, tenements, and hereditaments, of the said *Oliver Le* "*Neve*, situate, lying and being in the towns, *&c.*"

This is large enough to take in any of the lands in the places before mentioned.

Now, where a man is making a general settlement of his estate, I am of opinion, that a nominal manor will pass under these general words, though there is a sort of heraldry in the law in some cases; as for instance, in the acts of parliament relating to the clergy.

As

As to comprized, or *nient comprized*, in the law, upon this head, enjoyment will determine whether it is comprized or not. NORRIS *v.* LE NEVE.

The commissioners had nothing to do, in setting out boundaries, to consider it as a manor, but only to distinguish freehold from copyhold: for manors do not properly consist of metes and bounds, therefore I will quash the certificate of the commissioners (1).

As to the question, Whether the expence of the commission shall fall upon the plaintiff only?

There does not seem to have been any default either in the plaintiff or defendant, that these lands are mixed and confounded; and therefore it would be hard to throw the whole upon the plaintiff. [83]

But then the difficulty will be, whether, as the defendant's interest is much more inconsiderable than the plaintiff's, he should bear the expence equally with the plaintiff.

I do not know any instance where the court have taken this into their consideration, where the value of the estate belonging to both parties is considerable, though not equal.

For it is possible, nay, even probable, that the confusion might arise from the estate of less value: and if I was of opinion that the estate of less value, should bear the proportion, according to its value, I must direct an account before a Master, which would be attended with a much greater expence to both sides, and therefore I had better keep to one uniform method, than lay down a new rule of this kind, for it would be most mischievous to the parties themselves (2).

Though the interest of one party is more inconsiderable than the interest of another, yet they shall bear equally the expence of a commission settling boundaries, and separating freehold and copyhold.

(1) "His Lordship doth order, that "such part of the said certificate whereby the said commissioners certify their "doubt concerning the said *manor* and "court leet, be quashed; the same not "being warranted by the commission."

(2) Decreed, that one moiety of the costs should be borne by the plaintiff; the other moiety by the defendant. *Reg. Lib. B.* 1743. *fol.* 362.

Furnival versus *Crew*, *May* 1, 1744. Case 32.

IN 1682, the defendant's grandfather, Mr. *John Crew*, being seised in fee, "made a lease the 24th of *October* 1682, "to *Thomas Moor*, in consideration of his surrendering of a "former lease of the premisses in question, whereof there were "two lives in being; and in consideration of one hundred and "thirty-six pounds in hand, paid by the said *Thomas Moor*, "Mr. *John Crew* demised to *Thomas Moor* and his assigns, a "messuage in *Elton*, with the appurtenances, to hold to the "said *Thomas Moor*, and his assigns, for the lives of him the "said *Thomas Moor*, *Margaret* his wife, and *John* his son, and "the life of the longest liver of them, under the yearly rent of "forty-three shillings and eight-pence; and in the said lease "*Thomas*

Lord *Hardwicke*, on the circumstances of this case, was of opinion, the plaintiff was intitled to a new lease, with a covenant of renewal to be inserted in it, as well upon the death of the additional lives, as upon the death of the old.

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"*Thomas Moor* covenants for himself, his executors, administrators, and assigns, and doth agree to and with the said *John Crew*, his heirs and assigns, that *Thomas Moor*, his executors, &c. at the death of any of the lives aforementioned, which shall first happen, shall pay to *John Crew*, his heirs or assigns, within twelve months next ensuing such death, the sum of sixty-eight pounds in the name of a fine (1), for every life added or renewed, from time to time, according to the true intent and meaning of these presents; and the said *John Crew* for himself, his heirs, executors, and assigns, doth covenant and agree, to and with the said *Thomas Moor*, his executors and administrators, that the said *John Crew*, his heirs, executors, and assigns, *shall and will* (for the consideration of the said sum of

[84]

68 *l.* to be paid to the said *John Crew*, his heirs, &c. at *Crew-hall*, or at the place where the said hall now stands, in the name of a fine, for adding one life to the remaining lives afore- mentioned) *execute one or more lease or leases, under the same rent and covenants*, as are expressed in *these presents, and so to continue the renewing of such lease or leases to Thomas Moor*, or his assigns, paying as aforesaid to the said *John Crew*, his heirs or assigns, the sum of 68*l.* for every life so added or renewed as aforesaid, from time to time, according to the true intent and meaning of the said indenture." (2).

(1) "For to add one other life to the remaining two lives, *and so to continue the renewing of this lease or leases*, paying as aforesaid to the said *John Crewe* the sum of 68*l.* for every life so added or renewed as aforesaid, from time to time, according to the true intent and meaning of these presents; And the said *John Crewe* for himself, his heirs, executors, administrators, and assigns, doth covenant and agree to and with the said *Thomas Moore*, his executors and administrators, that he the said *John Crewe*, his heirs, executors, &c. *shall and will* for the consideration of the said sum of 68 *l. as aforesaid to be paid* to the said *John Crewe*, his heirs, &c. at *Crewe-hall*, or at the place where the said hall now stands, *seal and execute one or more lease or leases under the same rents and covenants with these presents*, and therein to add such life or lives of such person or persons, as shall be then, and at such time nominated to be added by the said *Thomas Moore*, his executors, &c. within the term of twelve months, next after the death of any such life as aforesaid, according to the true intent and meaning of these presents."

(2) It appears from *Reg. Lib. B.* 1743. *fol.* 429. that *J. Crewe* the lessor previous to the above lease had in consideration of *natural love, &c.* settled the premisses in question upon himself for life, remainder to his daughter *Ann* for life, with a remainder over, under which the defendant the son of *Ann*, claims. There were powers of leasing to the tenants for lives. The lessor dies; and *Ann* renews the lease, and enters into the same covenants and worded in the same manner as those above. The question now arises between the plaintiff as assignee of *Moore*, and the defendant the son of *Ann*, who denies that he is bound by the covenant of his mother, who was only tenant for life. As Lord *Hardwicke* decreed for the plaintiff, it is observable, that the above settlement not being made for a valuable consideration, was of course void against purchasers; and that the *lessee* was even as to his covenant for renewal considered as a purchaser for a valuable consideration.

The

The bill was brought by *Furnival*, one of the assigns of *Thomas Moor*, that his lease may be compleated by filling up the lives, and that the same covenant of renewal may be again inserted upon the dropping of any of the additional lives. FURNIVAL v. CREW.

The defendant insists, that after the lives had been once filled up, there ought to be no new clause of renewal.

Mr. Attorney General, for the plaintiff, cited *Hyde* v. *Skynner*, 2 *P. Wms*. 196. and *Bridges* v. *Hitchcock*, *June* 15, 1715. (1).

Mr. Solicitor General, for the defendant, cited the case of *Doctors Commons* v. *The Dean and Chapter of St. Paul's*, before the House of Lords, in 1727 (2).

LORD CHANCELLOR,

The original bill was brought by the plaintiff against the defendant Mr. *Crew*, to have the benefit of a covenant in two leases made by the grandfather of the defendant, and to have a specific performance of the covenants.

The first lease was made in 1681, for three lives.

The second lease in 1682, for three lives also.

In each of these leases the covenants are penned in the same words.

The fines are different, and the rents are different, according to the particular value of the estates: the fines are no more than 10*l*. (3).

There is one circumstance wherein they differ.

The lease of the *Sambourne* estate was made when the grandfather was seised *in fee* of the estate.

The second lease, when the grandfather, by a settlement, had made himself only a tenant for life, with remainder to daughters, &c.

But that does not make any difference in the equity of the plaintiff, because the settlement was admitted to be voluntary, and therefore will not prevail against the plaintiff, who is a purchaser for a valuable consideration. [85]

No lives dropped during the life of Mr. *Crew* the lessor.

After his death two lives dropped, and a new life was added by the defendant's father and mother jointly, and another by her singly after the death of her husband.

On the renewal the same covenants were inserted *verbatim*.

A *cestui que vie*, who was a new life in one of the leases, is dead, and the renewal is asked upon his death.

In the other, the renewal is asked upon the death of the last of the old *cestui que vies* under the *first* lease.

I do not find that the renewal is much disputed, but the principal question is upon what terms.

The first consideration is, what should be the true construction of these two covenants; and this indeed will determine the whole, for the rest will be consequential.

Upon these the question is, Whether the obligation on the part of the plaintiff to tender the fine, and the obligation on

(1) 1 *Bro. Par. Ca.* 522. S. C.
(2) 3 *Bro. Par. Ca.* 389.

(3) This relates to leases of other lands.

FURNIVAL v. CREW.

the landlord to renew, are only upon the death of the first *cestui que vies*, or whether the tenant, upon tendering a fine, would have a right to demand a renewal upon the death of any of the new added lives.

I am of opinion that the plaintiff is intitled to have the like covenants inserted upon every renewal, as well upon the death of the new lives, as upon the death of the old.

It has been insisted on the part of the defendant, that this branch of the covenant was confined only to the first of the three lives that should drop in the lease; and to be sure their observation is right: but then come the following words, *and so to continue the renewing of such lease or leases to Thomas Moore or his assigns, paying as aforesaid.*

What is the meaning of these words *so to continue?*

It has been urged for the defendant, that these words mean only to continue the lease, by adding a new life on the death of the *first* lessees only.

[86] But I am of opinion the words do not mean barely continuing *a new life*, but continuing and filling up the estate from time to time.

But there is more force in the words still, for it is continuing *the lease or leases.*

The word *or* there must be construed as *and* (1), for it must be admitted on the part of the defendant that it means and comprehends new leases.

If it comprehends some new leases, where will you stop? Why will it not comprehend the renewal of *the lease* that will be granted upon the dropping of the last survivor of the old lives, as well as any of the prior leases; I am now on the lessee's covenants.

The next consideration is on the construction in the covenants on the part of the lessor.

That he the said John Crew, &c. for the consideration of the said sum of 68 l. &c. shall or will execute one or more lease or leases, under the same rents and covenants.

So that here is a covenant to grant a new lease under the same *rents and covenants*, which includes and takes in the covenant for renewal as well as any other covenant.

For every life so added as aforesaid, &c.

It is contended on the part of the defendant, that it means only the first lives.

But I am of opinion that it means any of the lives in the future leases; for the words are general, that he will grant it for such life as aforesaid, which will comprehend the whole within this form of expression.

Thus much for the construction of the words.

There are two circumstances.

The 68 *l.* is *to be paid at Crew-hall*, or at the place where the said hall now stands.

I do not imagine that the lessor thought that *Crew-hall* would be pulled down before the expiration of three lives; but still, as Lord *Hale* said in the case of *King* versus *Melling*, 1 *Vent.* 232. the meaning is to be spelled out by little hints.

(1) *Vide Read* v. *Snell, ante* 2 vol. 645, and the cases cited in the note there.

There

There is no instance of such a contract, as the defendant's counsel would make this tenant contract for; for it is most probable that a man should contract for either two leases for three lives, or for perpetuating the renewal. FURNIVAL v. CREW.

It is not a natural way of contracting to have had the second lease for new lives, to have determined upon the death of the last life in *the old lease*.

It has been asked, whether any breach could be assigned at law, upon an action of covenant against the heir at law, or executor of the grandfather: And I am of opinion, even at law, a breach might be assigned.

I agree that the two covenants, one on the part of the lessor, and the other of the lessee, must be commensurate with one another, and that upon these words *to continue the renewing, &c.* an action might be supported.

And therefore, if a breach might be assigned at law either against the lessor or lessee, the question is, whether this is a proper case for relief in equity; and there is no doubt but it is.

First, from the nature of the covenant.

It is a covenant to make an estate in land; and if my construction is right, the suit here is most proper, because this court can give the thing itself, which is a higher and more adequate remedy than damages only, which is all the law gives.

A proper case for relief in equity, for this court can give the thing itself, a more adequate remedy than damages, which is all the law could give on an action for breach of covenant.

Secondly, as to the condition of the person who is called upon to renew.

This is a covenant which binds the lands in a court of equity, and therefore gives the relief against the proper person who is in possession of the land, as it has a lien upon it.

But against this, some objections have been made on the part of the defendant.

First, that these covenants for perpetual renewals ought to be discouraged, for it is taking so much of the inheritance from the owner. And indeed it is true; but still agreements for a valuable consideration ought to be performed, for the grandfather had *the fee*, and might have sold it if he pleased, or charged it, and therefore should be supported here.

There was another objection, that the consideration is not adequate.

But as to that, I lay no great weight, for there is nothing excessive as to the advantages or disadvantages of one side or the other. [88]

As to the cases of *Bridges* versus *Hitchcock*, and *Hine* versus *Skinner in the Exchequer*, which went up afterwards into the house of Lords, there were no fines to be paid in either of those cases; and therefore where the lessor has taken care, as he has done here, that his successors shall have a consideration paid, it makes a much more favourable case for the plaintiff.

A third objection was, the plaintiff's demanding a renewal with the like covenants, which perhaps it is not in the power of the defendant to comply with.

But

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But I am of opinion as to the lease of 1681, no objection of this kind could arise, for the grandfather was tenant *in fee*.

The right of renewal with the like covenants arises out of the original covenants, and runs along with the land.

But I do not say that the defendant is to insert the covenants *verbatim*, for in framing the decree, he may be directed to covenant as far as his interest in the estate will go, so as to bind himself, and all parties claiming under him.

Though I do agree that the defendant is not bound by what his father or mother did, yet it shews what their apprehension was, *that this was a lease to be renewed for ever.*

As to the authorities, in the case of *Doctors Commons*, cited on the part of the defendants;

The house of Lords there decreed a new lease to be made for the term of 40 years, but without a covenant for renewing again: But this was founded upon one of the restraining statutes, which was endeavoured to be evaded by giving bonds.

The case of *Hinde* versus *Skinner* cannot be applied as an authority in the present case, nor can hardly be an authority in any, the decree there looked something more like an award, and a compromise, than a decree.

But the case of *Bridges* versus *Hitchcock*, cited on the part of the plaintiff, is much more applicable: "There a lease was "made for 21 years of a corn-mill to be repaired by the tenant, "and there was no covenant on the part of the lessee to pay a "fine, but a covenant on the part of the lessor, that he would "six months before the expiration of the lease grant another at "the election of lessee without any fine *upon the same rents and* "*covenants*."

[89] The question was, whether there must be a covenant for renewal again in the second lease.

Under the words *the same rents and covenants*, the court of Exchequer was of opinion in *Hine* versus *Skinner*, the covenant for renewal ought to be inserted, and this decreed afterwards affirmed in the house of Lords.

The court of exchequer were of opinion that under the words *the same rents and covenants*, the covenant for renewal ought to be inserted; and on appeal to the house of Lords the decree was affirmed. It was mentioned there that 1800 *l.* had been laid out by the tenant, in turning the corn-mill into a wire-mill, and therefore he was intitled to a building lease.

Suppose the court had decreed him another term only of twenty-one years, it might appear to be a satisfaction for the sum so expended; but the court of exchequer were of opinion to decree him a lease with the same covenant of renewal from time to time.

I am of opinion upon the whole, that in the present case the plaintiff is intitled to a new lease, with a covenant of renewal to be inserted in it (1); his Lordship dismissed the cross bill. (2).

(1) *Vide Cooke* v. *Booth*, *Cowp.* 819. *Somerville* v. *Chapman*, 1, *Bro. Cha. Rep.* 62. *Tritton* v. *Foote*, 2. *Bro. Cha. Rep.* 636. *Russell* v. *Darwin*, *ibid.* 639.

(2) *Reg. Lib. B.* 1743. *fol.* 429.

Wiltshire versus *Smith*, *May* 28, 1744. Case 33.

Where there are covenants in a deed of assignment on the part of a mortgagee, he may refuse to take the principal and interest, though tendered, till he has had an opportunity of advising with his attorney whether he may safely execute. (1)

A Bill was brought to redeem a mortgage on the 8th of *May* 1742, in which the plaintiff insists upon a redemption on paying the principal money only, for that the interest ought to end the 20th of *February* 1741, because the plaintiff had given six months notice to pay off the mortage, and *on that day tendered the principal and interest, and a deed of assignment, but the defendant absolutely refused to take the money.*

The defendant swears that he offered to take the money, provided he might have time to consider of it, and to advise upon the deed of assignment, as there are covenants in it on his part, upon which, as he is not of the profession of the law himself, it is reasonable he should ask the opinion of some attorney, whether they were such as he might safely execute.

LORD CHANCELLOR,

There is not one case in twenty upon the fact of an absolute refusal after a tender that is ever made out: for they are generally attended with circumstances that explain the refusal, and are nothing more than causes cooked up by country attornies, to make themselves business. The plaintiff did not, as he ought to have done, send a draught of the assignment to the defendant, any time before the money was tendered.

The plaintiff insists that the defendant absolutely refused to take his money, or execute the deed of assignment; if this had been the fact, it would have been unconscionable and unreasonable in the defendant. [90]

But the person, who was to take an assignment of the mortgage swears, that the defendant desired further time, or to that effect.

The question is, Who was in the wrong?

The plaintiff certainly was.

For where there are covenants on the part of the mortgagee, it is very reasonable that he should have some time to look them over: And the plaintiff's attorney ought to have left the deed for a week with the defendant, that he might have an opportunity to advise upon it, and the plaintiff's attorney should have appointed a time to pay the money after the defendant had been allowed a sufficient time to advise; or, as I said before, he should have sent a copy, or the ingrossment of the assignment.

But the subsequent transaction, and what passed before the filing of the bill, explains it:

(1) With respect to stopping interest on a mortage; *vide Gyles* v. *Hall*, 2 *P. W.* 378. *Bishop* v. *Church*, 2 *Ves.* 372. *Garforth* v. *Bradley*, 2 *Ves.* 678. *Shrapnell* v. *Blake*, 2 *Eq. Ab.* 603. *pl.* 34.

WILTSHIRE
SMITH.

Did ever a mortgagor, as is the case here, after he was put under this difficulty, lie by a year and quarter without bringing a bill to redeem.

What could be the reason?

Why the plaintiff, the mortgagor's attorney, told him you have made a tender of your mortgage money, and the defendant's refusal has forfeited his interest, so that you may keep the money, and by a bill compel the defendant to take the principal without interest from the time of the tender.

Lord *Hardwicke* ordered, that it be referred to a master to take an account of what was due to the defendant for principal, interest, and costs on the mortage, and on the plaintiff's paying to the defendant what the master shall certify to be due within six months after he has made his report, it was decreed the defendant should assign the mortgaged premisses, as the master should direct; but in default of the plaintiff's paying as above directed, it was ordered the plaintiff's bill do stand dismissed. (1).

(1) *Reg. Lib. Lib. B.* 1743. *fol.* 451. *Note*, this mortage was by way of term for years, and if the mortgagor had tendered the money at the appointed day, then, according to the usual proviso in such cases, the term would have ceased, and no *assignment* necessary; but as default was made in payment, the term became absolute at law, and an assignment was necessary to revest it in the mortgagor.

Case 34
[91]

Skip versus *Huey, Wilcox and Edwards*, *May* 28, 1744.

H. and *W.* were principals in a bond, and *E.* a surety only, the obligee agrees with *H.* to take *four* notes drawn by different persons, and payable at future days, in lieu of the bond, but compelled *H.* to sign an agreement in his own name, and in the names of *W.* and *E.* to pay the deficiency, if the notes should not produce the whole principal and interest on the bond; before the notes became due *H. and W.* were bankrupts; the obligee having received only 500 *l.* on the notes, brings his bill for the residue of the principal and interest against *E.* as a co-obligor. *Lord Hardwicke had some doubt at first, but on all the circumstances of this case declared himself fully satisfied that the plaintiff was not intitled to relief against E.*

THE defendants were jointly and severally bound to the plaintiff in the penal sum of 4000 *l.* on the fifth of *December* 1739, conditioned for the payment of 2000 *l.* on the 5*th* of *March* ensuing, which money came to the hands of *Huey* and *Wilcox*, who were the principals in the bond.

Huey comes to the plaintiff, and desires he will take four notes given by different persons, and payable at future days, in lieu of the bond, and that if he would give up the bond, though the notes should not produce the whole 2000 *l.* and interest, he would see him paid the deficiency, and signed an agreement to this effect in his own name, and in the names of *Wilcox* and *Edwards*: *Huey* likewise gave the plaintiff a draft on *Martin* the banker.

But *Huey* coming to the plaintiff on a *Saturday* after six o'clock, desired the plaintiff would give him leave to date the draft on *Martin* of the *Monday*.

Huey

Huey had taken out of *Martin*'s shop all the money due to himself and *Wilcox* and *Edwards* on the very same *Saturday*.

The plaintiff afterwards went to *Martin*'s shop, where he found no money in the name of *Huey* and Company. And before the notes became due *Huey* and *Wilcox* were bankrupts, but *Edwards* still remains a solvent person.

The plaintiff, who has received about five hundred pounds on the notes, (the rest remaining unreceived to this day,) brings his bill against *Edwards* the co-obligor, for the residue of the principal and interest due on the bond, insisting this was a fraud of *Huey*'s upon him, and that though he has been drawn in to deliver up the bond, yet he is intitled to be relieved against *Edwards* as a co-obligor.

The defendant *Edwards* insisted, that he was no party to the agreement between the plaintiff and *Huey*, and that he ought not to be affected by it; and as the bond is delivered up in consideration of the notes, that it is *novated*, and this defendant, who is one of the sureties only in the bond, is released, and no longer liable as a surety.

Mr. *Chute*, of counsel for the plaintiff, cited 1 *Salk*. 124. *Clark* versus *Mundall*. [92]

Mr. Attorney General for the defendant insisted, that at law the bond being cancelled, the plaintiff had no remedy there: and the defendant *Edwards* being a mere surety, a court of equity will not strain to assist the obligee against a surety, but will leave him to his remedy at law. And if the obligee has come to a new agreement to take other security in lieu of the bond, equity will not compel a surety to pay, upon a bond which is by the plaintiff's own consent cancelled, and where on the back of it is acknowledged that he has received in full satisfaction for it.

The words of the agreement are, "That if any of the sums "of money on these notes, or interest, should not be paid, we "promise to make it good." Signed by *Huey* for himself, and for *Wilcox* and *Edwards*.

He argued, that this was in nature of a forgery, to sign the names of other persons without their authority, and such a fraud in the plaintiff, to oblige *Huey* to sign an agreement in this clandestine manner, that he does not come into a court of equity so free from imputation himself, as to be intitled to relief.

That *Huey* and *Wilcox* were the *bonâ fide* proprietors of these notes, and gave a full consideration for them.

That the plaintiff, though some of the drawers of these notes did not become bankrupts till two months after the notes were assigned over to him, yet did not apply to them once for acceptance, and if he had immediately done it, he might have received all the money upon them; and therefore, as his not receiving is intirely owing to his own laches, he is not intitled to come upon the defendant to make it good, who is only *a surety* in the bond.

The evidence for the defendant *Edwards* is, that there was in *Martin*'s hands a balance of 300*l*. and upwards in favour of *Huey* and

SKIP v. HUEY. and Wilcox on the *Monday*, and if the plaintiff had not deferred it two days longer, *Martin* would have paid this money to him.

That it being plainly the intention of the plaintiff to give up this bond absolutely, and the security he took in lieu of the bond becoming defective by his own laches, Mr Attorney General insisted the plaintiff shall not be allowed to resort to the defendant to make up the deficiency.

Mr. Solicitor General of the same side said, *Edwards*, before *Huey* applied to the plaintiff, was uneasy at being *a surety*, and [93] at his importunity, this application to the plaintiff was made; for it appears by the plaintiff's own bill that he asked *Edwards* why he was so uneasy at being a co-obligor, and that he answered he had very good reasons.

After this the plaintiff agrees with his eyes open to accept of the notes, and, to satisfy *Edwards*, *puts the bond into Edwards's hands with a receipt on the back in full for principal and interest*.

What could be the meaning of this transaction, why plainly to remove *Edwards*'s uneasiness, and to let him loose intirely from being liable any longer as a co-obligor in this bond.

LORD CHANCELLOR,

I have had some doubt during the course of this cause, but am now fully satisfied that the plaintiff is not entitled to relief.

Mr. *Edwards* has not been guilty of any fraud.

Where a bond is burnt or cancelled by accident or mistake, or where a principal procures it to be delivered up by fraud, this court will set it up against a surety, though extinguished at law.

There are many cases where equity will set up debts extinguished at law against a surety, as well as against a principal; as where a bond is burnt or cancelled by accident or mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors (1).

But this is not one of those cases, for the whole transaction was in order to discharge *Edwards*; Mr. *Skip* was told so, and *Huey* informed him that *Edwards* and he had quarrelled about it, and *Skip* himself asked *Edwards* how he came to be so pressing to have the bond delivered up, so that he was fully apprised it was solicited at the importunity of *Edwards*.

Skip was a competent judge of what he should do, and might have declined it; but, instead of that, accepts the notes from *Huey*, and a draft on *Martin* the banker for the *Monday* following, which shews the confidence and reliance *Skip* had in *Huey*, for it is very unusual to take such a draft.

It is plain from hence that *Skip* discharged *Edwards*, for he knew *Edwards* would not trust *Huey* any longer.

What is the rule? He who trusts most shall lose most; if *Skip* had refused, *Edwards* might have arrested *Huey* upon the note which he had given *Edwards* by way of indemnity against the bond.

(1) But a release to one obligor is a release to the other obligors both at law and in equity. *Bower* v. *Swadlin*, ante 1 vol. 294.

 It

SKIP v. HUEY

It is said there is a fraud in part of the case relating to the draft on *Martin*; perhaps it may be so, but this is not clear; and what has been done by *Skip* preponderates, and rebuts the fraud; for it was not right in him, after he had delivered up the bond, to make *Huey* sign such an agreement in the names of *Wilcox* and *Edwards*.

What was the original scope and intention of the application, but that the bond might be delivered up, and *Edwards* absolutely discharged.

Instead of this what does *Skip* do? Why he takes a note, and makes *Edwards* liable by another instrument, and was a plain deceit upon *Edwards*; whereas the intention was clearly to discharge him, and therefore the bill must be dismissed, but without costs.

Perrot versus *Perrot*, *the Second general Seal after Trinity Term June* 30, 1744. Case 35.

A limitation to *A.* for life, to trustees to preserve, &c. to the first, &c. sons of *A* in tail, remainder to *B.* for life, remainder to his first, &c. sons in tail, reversion in fee to *A.* who cuts down timber, against whom *B.* brought his bill for an injunction to stay waste: though *B.* has no right to the timber, yet as he has an interest in the mast and shade, if *A.* should die without sons, and as *B.* could not maintain an action, not having the immediate remainder, the court continued the injunction.

THERE was a limitation in a settlement to the defendant for life, to trustees to preserve contingent remainders, to his first and every other son in tail, remainder to plaintiff for life, (1) with remainder to his first and every son in tail, reversion in fee to the defendant.

The first tenant for life (2) cuts down timber, the plaintiff, who is the second tenant for life, brings his bill for an injunction to stay waste.

Mr. Attorney General for the plaintiff shewed cause why the injunction for restraining the defendant from committing any further waste should not be dissolved.

It was insisted by Mr. Solicitor General, for the defendant, that the timber which he has cut down, are decayed trees, and will be the worse for standing, and that it is of service to the publick, that they should be cut down; and that it is very notorious that timber, especially oak, when it is come to perfection, decays much faster in the next twenty years, than it improves in goodness the twenty years immediately preceding.

That as the defendant has exercised this power in such a restrained manner, and confined himself merely to decayed timber, which grows worse every day, that this court will not interpose, especially as the plaintiff is not entitled to come into this court, as he has not the immediate remainder, and besides has no remedy law.

(1) Remainder to trustees to preserve contingent remainders.

(2) Before he had any son.

PERROT v. PERROT.

LORD CHANCELLOR,

The queſtion here does not concern the intereſt of the publick, unleſs it had been in the caſe of the King's foreſts and chaſes; for this is merely a private intereſt between the parties; and it is by accident that no action at law can be maintained againſt the defendant, becauſe no perſon can bring it, but who has the immediate remainder.

Conſider too in how many caſes this court has interpoſed to prevent waſte.

The truſtees to preſerve contingent remainders may bring a bill to ſtay waſte in the tenant for life.

Suppoſe here the truſtees to preſerve contingent remainders had brought a bill againſt the defendant to ſtay waſte for the benefit of the contingent remainders (1).

I am of opinion they might have ſupported it, but here it is the ſecond tenant for liſe (2), who has done it, and though he has no right to the timber, yet if the defendant, the firſt tenant for life, ſhould die without ſons, the plaintiff will have an intereſt in the maſt and ſhade of the timber.

The caſe of *Welbeck Park*, which has been mentioned, was a very particular one, becauſe there, by the accident of a tempeſt, the timber was thrown down, and was merely the act of God.

The cutting down decayed timber, is as much waſte as cutting down any other.

But this is not the preſent caſe, for here *a bare tenant for life* takes upon him to cut down timber, and it is not pretended that they are pollards only: and though the defendant's counſel have attempted to make a diſtinction between cutting down young timber trees that are not come to their full growth, and *decayed* timber, I know of no ſuch diſtinction, either in law or equity.

Therefore upon the authority of thoſe caſes which have been very numerous in this court, of interpoſing to ſtay waſte in the tenant for life, where no action can be maintained againſt him at law, as the plaintiff has not the immediate remainder, the injunction muſt be continued till the hearing (3).

(1) *Vide Whitfield* v. *Bewit*, 2 *Cox's P. W.* 240. note 1. *Garth* v. *Cotton*, *poſt* 751. *Williams* v. Duke of *Bolton*, 3 *Cox's P. W.* 268. note 1.

(2) Vide *Roſwell's* caſe, 1 *Roll's Ab.* 377. *pl.* 13. 3 *P. W.* 268. note F.

(3) *Reg. Lib. B.* 1743. fol. 432.

Caſe 36. *Mabank* verſus *Metcalf*, *July* 4, 1744.

On a bill brought againſt an executor for an account of aſſets, the evidence of a co-executor, which tended to increaſe the teſtator's eſtate, was not allowed, as it was ſwearing for his own benefit.

A Bill was brought by a creditor againſt an executor for an account of aſſets.

The

The plaintiff offered to read the evidence of a co-executor, which would have tended to increase the testator's estate, and consequently was swearing for his own benefit. PERROT v. PERROT.

LORD CHANCELLOR,

There is an established difference in this court between an executor and a trustee (1).

For the trustee has the legal right only, and is merely nominal, but an executor has something more in him than the mere legal right, as a bare trustee, for he has a beneficial interest if there is any surplus.

A trustee has a mere legal right only, but an executor has more, for if there is a surplus, he has a beneficial interest.

But I am not satisfied you can read his evidence for another reason, because *this executor* has a legacy of twenty-five pounds and the releasing it does not alter the case: for it is so much assets in the hands of the other executor, that he is still liable to creditors of the testator if there are not assets *ultra* the legacy, and therefore his Lordship refused to admit the evidence.

(1) Vide *Goss* v. *Tracy*, 1 *P. W.* 290. *Croft* v. *Pyke*, 3 *P. W.* 181. *Man* v. *Ward*, *ante*, 2 vol. 229. *Fotherby* v. *Pate*, *post*. 604. *Goodtitle* v. *Welford*, *Dougl.* 134. *Lowe* v. *Jolliffe*, 1 *Black. Rep.* 365.

Clark versus *Sewell*, *July* 7, 1744. Case 37.

EDWARD *Godfrey* by his will gives a legacy of two thousand pounds to trustees, in trust to pay the interest thereof to his wife for life, and after her death the benefit of the principal to his son (1), but if he died before twenty-one, then he gives it over to his daughters, and makes *James Sewell* and two more persons executors.

A legacy that ought to be deemed a satisfaction must take place immediately at the testator's death, for a debt being due then, the legacy must be so too, and not being payable in this case till a month after, the court held it to be no satisfaction (2).

The son attains twenty-one, and became intitled to the two thousand pounds.

The directions in the will were that the executors should carry on the testator's trade of a brewer, and in compliance with this they suffered the two thousand pounds as well as the rest of the testator's estate to continue in the trade.

The son after he had attained his age of twenty-one still carried on the trade on the foot of the same stock which was left by his father.

The son afterwards makes *his* will without any reference at all to his father's, and gives a legacy of ten thousand pounds upon different trusts from what his father had done of the two

(1) "*Edward Godfrey* at 21 and also "devises all his freehold estates to his "son with remainders over to testator's "daughters and their heirs in case his "son should die under age, without "issue."

(2) See *Nicholls* v. *Judson*, *ante*, 2 vol. 300.

CLARK v. SEWELL.

thousand pounds, "for after the interest of the ten thousand "pounds to his mother for life, he gives the principal to his sister "*Sewell*'s children, and charges it upon all his real and personal "estate, and to be paid to trustees *in a month after his death.* "Then follows a specific devise of a farm of thirty pounds a "year to *Rivers Dickinson*, and then another legacy of ten "thousand pounds to his sister *Browning*'s children, and then "a legacy of five thousand pounds, &c. And then the rest "and residue of all his estate, real and personal, after payment "of debts and legacies, among the children of his sisters "*Sewell* and *Browning*."

The son soon after dies, the plaintiff, as devisee of the mother, insists both on the interest of the 2000*l.* as well as of the 10,000*l.* and has brought his bill for that purpose.

LORD CHANCELLOR,

The first question is, Whether the interest of the 10,000*l.* given by the will of the son, is to go in satisfaction of the interest of the 2000*l.* left by the will of the father.

Secondly, Whether the plaintiff is intitled to a priority of satisfaction and payment before the other legatees under the will of *Godfrey the son*; and this divides itself into two more questions, one as to the real, and another as to the personal estate.

As to the principal question, Whether it ought to be deemed a satisfaction in this court according to the rule with regard to legacies being a satisfaction of debts, I am of opinion with the plaintiff, and that it ought not to be held a satisfaction.

It is true there are many cases which have carried the doctrine of satisfaction a great way.

Legacies naturally imply a bounty, and therefore, on the point of satisfaction, the court have of late laid hold on any circumstance to distinguish the latter from former cases.

In later cases the court have said this doctrine has been carried too far, *for legacies naturally imply a bounty*, and therefore, tho' the court of late have not altogether disavowed this doctrine of satisfaction, yet they have been very inclinable to lay hold of any circumstances to distinguish the latter from former cases.

The consequence of the son's carrying on the trade with his father's stock, was, that the 2000*l.* was a debt due upon his father's estate in his hands, or more directly and properly a demand upon his father's executors.

There is no pretence to say, that the principal of the 10,000*l.* can be a satisfaction of the principal sum of 2000*l.* to the mother.

Nor is there any thing in the will that declares this to be a satisfaction of the interest of the 2000*l.*

[98] But the point of time it is said is so trifling, it being only a month, that no regard should be paid to it, but though a small one, yet it is a circumstance that the plaintiff has a right to lay hold of, to take this out of the cases that have been deemed a satisfaction.

For according to the rule of this court, a legacy that ought to be deemed a satisfaction must take place immediately after the

the death of the teſtator: for the debt, whether of a principal ſum or for intereſt, is due at the death of the teſtator, and therefore the legacy muſt be ſo too.

What I have ſaid hitherto, I confine to the ſatisfaction of *debts*, for I agree the caſes of ſatisfaction of *portions* have gone further, for where both the proviſions move from the father to the ſame perſons, and for the ſame purpoſes, this court, which always leans againſt incumbring eſtates twice over, will overlook little circumſtances of time as to the payment of the two ſums to children, if it appears to be a double portion, and a double proviſion for younger children (1).

This court, which leans againſt incumbring eſtates twice, will overlook little circumſtances of time as to the payment of the two ſums to children, where both the proviſions move from the father, and are given for the ſame purpoſes.

But that has never been the rule with regard to *debts*, where the funds for payment are appointed by different perſons.

The intereſt of the 2000*l.* was part of the proviſion and livelihood of the mother, and a debt upon the eſtate of *Godfrey the father* in the hands of his ſon.

Now ſhe might have lived till within a day of the time, which was to be the commencement of the payment of the intereſt of the 10,000*l.* to her, and yet not have been intitled to it, and therefore could not be a ſatisfaction.

For there is no caſe to make a legacy a ſatisfaction of a debt, where the legacy is not due at the time of the teſtator's death, but is made contingent, and to take place at a future day (2).

I ſent for a caſe from the Regiſter, which I thought like this in ſubſtance, though it does not run *quatuor pedibus* and that is the caſe of *Crompton* v. *Sale*, 1 *Eq. Caſ. Abr.* 205. before Lord Chancellor *King* (3).

I lay no weight upon there not being aſſets here, becauſe it is owing to an accident there are not; and therefore this caſe in the reaſoning of it comes very ſtrongly up to the preſent.

For whether the poſtponing the legacy is a month only, or a longer time, it makes no manner of difference.

[99]

Where the court decrees a legacy to be a ſatisfaction of a debt, the court gives intereſt always from the death of the teſtator.

Where a legacy is decreed to be a ſatisfaction of a debt, the court gives intereſt always from the teſtator's death.

But in this caſe there is ſomething further ſtill, and that is a bond given by *Joſeph Sewell* to Mrs. *Godfrey* the mother, for the 2000*l.* dated the 16th of *February* 1729, reciting that *Catharine Godfrey*, in purſuance of the power given her by her huſband, does empower the ſurviving executor to lend and ad-

(1) See *Bollaſis* v. *Uthwatt*, *ante*, 1 vol. 426. and the caſes there cited in the note.

(2) *Spinks* v. *Robins*, *ante*, 2 vol. 492.

(3) 2 *P. W.* 553. S. C.

CLARK v SEWELL. vance the said principal sum of 2000 *l.* to *Joseph Sewell*, he securing to her the interest of the 2000 *l.* during her life (1).

It is true the act of executors cannot alter the right of parties, but it shews they understood it to be no satisfaction of the 2000 *l.*

This question would never have been started, had it not been for the deficiency of assets.

Another circumstance is the decree in *July* 1736, on the will of the son.

There was no imagination that the legacy of the 10,000 *l.* was intended as a satisfaction for the 2000 *l.* or the interest of it, for if so, it would have been mentioned in the decree as to the manner of taking the account; but instead of that, there is a general direction only to take an account of the debts of the son, *&c.* therefore I am of opinion that the 2000 *l.* must be considered as a debt, and the legacy of the interest of 10,000 *l.* was no satisfaction of the interest of the 2000 *l.*

The second question is, as to the preference; and first with respect to the personal estate.

All the subsequent questions are upon the foot of marshalling assets; but I shall lay these out of the case, for I am of opinion this legacy of 10,000 *l.* is not intitled to any preference.

The court will not strain to prefer one legatee to another, but where there is a deficiency of assets will let the general rule of equality take place.

For where legacies are given to persons of the same degree of relationship, the court will not strain to prefer one legatee to another, but will let the general rule of equality take place, unless there is something insuperable in the will, that does not justify the court in doing it.

By the son's will, the real and personal estate is charged with the payment of this 10,000*l.* to his sister *Sewell*'s children.

[100]

Appointing a legacy to be paid at a different time will not give a preference.

As to the point of time I lay it out of the case, for there never was a rule in this court that appointing a legacy to be paid at a different time, will give a preference to that legatee, but where there is a deficiency of assets, all the legatees must abate in proportion.

The testator's charging his *personal* as well as his real estate, is saying no more than what the law says; for if it had not been expressly charged by the testator, the court would have directed it to have been first applied, and therefore no argument of preference can be drawn from thence.

(1) *Joseph Sewel* (who was one of *E. Godfrey* the son's executors) by his answer, says, that he was indebted to *E. Godfrey* the son in 2000*l.* and that after his decease, and upon the request of *Rivers Dickinson* (one of *E. Godfrey* the father's executors), he entered into a bond conditioned for the payment of 2000*l.* which was to be in satisfaction of the aforesaid 2000 *l.* the interest whereof was to be paid to the said *Catharine Godfrey*, the widow, during her life; and which he had from to time paid her accordingly.

"I do

" I do hereby charge my estate both real and personal with " the payment of 10,000 *l.* &c. *Item*, all the rest and residue " which shall remain after payment of my debts and legacies, " I give to the trustees upon the trusts therein after men- " tioned."

CLARK *v.* SEWELL.

It was said this is a prior charge.

Suppose the testator had first applied these words to the 10,000 *l.* then repeated them again to the legacy of 5000 *l.* &c. what would this have done? Why, all the legacies would have been equally a charge on the real and personal estate, and not one more than the other.

Therefore I am of opinion, as a man cannot speak all his words at once, and as it is no matter how the clauses are placed in a will, it is no more than a general charge of all hi legacies upon the real and personal estate.

At the beginning the testator has taken care to charge all his estate with the payment of his debts.

This would have been sufficient to charge the real estate, if the personal estate was deficient.

There is therefore no ground to say that this legacy shall have the priority of the other.

This is such a construction as a court of equity would incline to come into, because it is making an equality between the legatees as to the loss which has happened, who are upon the same foot of relation to the testator.

This is my opinion as to the residue; the next question will be as to Mr. *Chute*'s client *Rivers Dickinson*, to whom the testator has specifically devised a farm of thirty pounds a year.

[101]

As to the case he put, that suppose a man devises all his real estate to *A.* and afterwards a particular farm to *B.* this would be an exception out of the generality to *A.* I admit it.

A man devises all his real estate to *A.* afterwards a particular farm to *B.* it is an exception out of the generality to *A.*

But it is otherwise, where there is a charge by a testator upon all his estates for payment of debts, for there the devisee must take subject to that charge; and if the residue is not sufficient to answer the debts (1), the estate devised to *Rivers Dickinson* must in the next place be applied for that purpose.

Where a testator charges all his estates for payment of debts, the devisee of a particular one must take subject to that charge.

His Lordship decreed (2) the defendant to pay the interest of the two thousand pounds to the plaintiff.

(1) His Lordship reserved the consideration in what manner and proportion the plaintiffs should receive satisfaction out of the lands devised to *Rivers Dickinson*.

(2) That the interest of the 10,000 *l.* was not a satisfaction of the interest of the 2000 *l.* " But that the arrears of " the interest of the 2000 *l.* ought to " be considered as a *debt*, and the in- " terest of the said sum of 10,000 *l.* " ought to be considered as a *legacy* " under the will of the said *E. Godfrey* " the son". *Reg. Lib. A.* 1743. fol. 655.

Case 38. *Heath* versus *Perry*, *July* 9, 1744.

A devise to five brothers and sisters (no relations) of 100 *l.* a-piece, to be paid to them at 21, if they attain that age, and not otherwise; and if any die before, the legacy or legacies to be utterly void. The legatees brought a bill for interest on their legacies; being not intitled to the payment of their legacies immediately, they shall not have interest in the mean time, nor the principal particularly secured to them till they shall arrive at their ages of twenty-one.

A Person by his will "gave one thousand pounds a-piece to "five brothers and sisters, (but who were no relation to "him), to be paid to them at their respective ages of twenty-one, "in case they should respectively attain that age, *and not other-"wise*; and if any of them should happen to die before they "attain their respective ages of twenty-one, that then and in "such case the legacy or legacies of one thousand pounds, so "given to them respectively, shall be utterly void and of no "effect (1)."

Then comes this clause.

"And I do hereby give my executors full power and liberty, "during the respective minorities of the five legatees, until "they shall attain their ages of twenty-one, or the legacies "otherwise become void, to lay the money out in mortgages or "other securities for the purposes and on the trusts of this my "will, and to call it in when they please, and my executors "not to be subject to any loss that may happen; and makes "*Baily Heath* his residuary legatee."

The bill was brought by the legatees for interest upon their legacies.

Mr. *Talbot* for the plaintiffs cited *Nicholls* versus *Osborne*, 2 *P. Wms.* 419. and *Taylor* versus *Johnson*, 2 *P. Wms.* 504.

[102] LORD CHANCELLOR,

Cases of this kind, *how far a legatee, who is not intitled to the payment of his legacy immediately, shall have interest in the mean time*, depend upon particular circumstances.

Some upon relationship, some upon the necessities of legatees, and most of them upon the particular penning of wills; and there is hardly one case which can be cited that is a precedent for another.

Where a legacy is given generally at marriage, or at 21, the vesting and time of payment are the same.

Some things are certain in these cases; for if a legacy is given generally at marriage, or at 21, then the vesting and time of payment are the same, and shall not vest till marriage, or 21.

Where a legacy is actually vested, as if given to *A.* payable at 21, yet it shall not carry interest.

To go one step further, where a legacy is actually vested, as if given to *A. payable at twenty-one*, yet it shall not carry in-

(1) "And should sink and merge in the surplus of the personal estate."

tereft,

tereft, unlefs fomething is faid in the will, that fhews the teftator's intention to give intereft in the mean time (1).

HEATH v. PERRY.

But all thefe cafes are fubject to this exception, if it is in the cafe of a child; for then let a teftator give it how he will, either at 21, or at marriage, or *payable* at 21, or *payable* at marriage, and the child has no other provifion, the court will give intereft by way of maintenance, for they will not prefume the father *inofficious*, or fo unnatural, as to leave a child deftitute (2).

In the cafe of a child, let a teftator give a legacy how he will, either at 21, or marriage, or payable at 21, or marriage, and the child has no other provifion, the court will give intereft by way of maintenance.

I have a note of the cafe of *Onflow* v. *Smith*, and by that it appears to have been heard before Lord *Cowper* the 5th of *July*, 8 *Ann.* there the legacy was given at 21, and yet he directed the money to be laid up in the mean time till it was feen whether the legatee would arrive at 21, and in a new caufe between *Onflow* v. *Draper*, the 27th of *June*, 9 *Ann.* it was held to be no vefted legacy.

However this direction may fhew Lord *Cowper*'s inclinations, yet it is not an abfolute determination, and therefore is no precedent.

As to the cafe of *Bourne* v. *Tynt* (on which a ftrefs was laid in *Ackerly* v. *Vernon*,) 2 *Ventr.* 346.

That was a portion to a daughter, and an only one, and alfo a vefted one, payable at a future day; a ftrong circumftance

(1) This is the cafe of a *particular* legacy, which is confidered as part of the general perfonal eftate; So *Palmer* v. *Mafon*, *ante* 1 vol. 505, *Atkinfon* v. *Turner*, *ante* 2 vol. 41. *Haughton* v. *Harrifon*, *ante* 2 vol. 330. *Loyd* v. *Williams*, *ante* 2 vol. 108. *Green* v. *Ekins*, *ante* 2 vol. 473, *Wyndham* v. *Wyndham*, 3 *Bro. Cha. Rep.* 58. *Shawe* v. *Cunliffe*, 4 *Bro. Cha. Rep.* 144. But with refpect to a *refidue* of a perfonal eftate, it feems fettled, that if it be devifed fo as to veft upon a contingency with a devife over, if fuch contingency does not happen, there the *intermediate* intereft will *accumulate*, and go along with the refidue. *Green* v. *Ekins*, *ante* 2 vol. 473. *Butler* v. *Butler*, *ante* 58 *Trevanion* v. *Vivian*, 2 *Vef.* 430. But if a refidue is bequeathed to an infant by way of *prefent-gift*, with a devife over in cafe of death under 21, there the intereft to the death of the infant under 21 will belong to him, or his reprefentatives. *Tiffen* v. *Tiffen* 1 *P. W.* 500. *Nicholls* v. *Ofborn*, 2 *P. W.* 419. *Chaworth* v. *Hooper*, 1 *Bro. Cha. Rep.* 82. *Hawkins* v. *Coombe*, *ibid.* 335. *Shepherd* v. *Ingram*, *Amb.* 448. *Defcrampes* v. *Tomkins*, 4 *Bro. Cha. Rep.* 149. note. Indeed from the cafes of *Nichols* v. *Ofborn*, *Chaworth* v. *Hooper*, and *Green* v. *Ekins*, it fhould feem, that if the refidue is given to the infant *payable*, or *to be paid* at 21 (which would alone make it a *vefted* legacy) with a devife over in cafe of death under 21, this limitation would not differ in conftruction from the laft rule. But the cafe of *Defcrampes* v. *Tomkins* appears certainly to make a diftinction between a bequeft by way of *prefent gift* with a devife over, and one *payable* or *to be paid at* 21, with a fimilar devife over. A diftinction of this kind certainly holds between particular legacies, as appears by the firft clafs of cafes above cited, and that of *Taylor* v. *Johnfon* 2 *P. W.* 504.

(2) So *Glide* v. *Wright*, 1 *Cha. Rep.* 265. *Harvey* v. *Harvey*, 2 *P. W.* 21. *Green* v. *Belcher* *ante* 1 vol. 505. *Incledon* v. *Northcote*, *poft* 438. *Hearle* v. *Greenbank*, *poft* 716. *Coleman* v. *Seymour*, 1 *Vef.* 211. *Beckford* v. *Tobin*, 1 *Vef.* 310. *Carey* v. *Afkew*, 2 *Bro. Cha. Rep.* 58. Secus as to grandchildren. *Palmer* v. *Mafon*, *ante* 1 vol. 505. *Haughton* v. *Harrifon*, *ante* 2 vol. 330.

there

there, for maintenance was allotted to her during her minority out of the very interest of the principal sum of 3000 *l.*

But though this was determined by a very great man, I own I should have had some doubt.

The trustees had paid over the surplus for some time to Mrs. *Bourne*, but stopping their hands the plaintiff brought her bill, and the cause was heard before Lord Keeper *Finch*, when he first had the seals, on the 28th of *June*, 31 *Cha.* 2.

Consider the objection there, the 80 *l. per ann.* was actually given to the mother for her maintenance, though indeed, as it was the case of a daughter, if the testator had not provided a maintenance, she should have had the interest for that purpose.

But the court laid hold of this single circumstance, that the 3000 *l.* was not directed to be laid out in land for the benefit of the residuary devisee, and that nothing was given to him but what was ordered to be invested in land: It was a disinherited daughter, and therefore the court was willing to strain in her favour.

Whether a whole or part of a debt due to the estate is given as a legacy, it is equally specific, and consequently a distinct tree and distinct fruit; but if given out of the great tree of the estate, no ground to sever a branch from it in favour of a general legatee (2).

The case of *Phillips* v. *Carey* (1) was clearly a vested legacy, and only the time of payment was postponed; it was a sum of 1000 *l.* and part of it out of a specific debt due to the testator, therefore this was a specific legacy: and whether the whole or part of a debt due to the estate is given as a legacy, it is equally specific, and therefore a distinct tree and distinct fruit; but where it is only given out of the great tree of the estate, there is no ground to sever a branch from it in favour of a general legatee.

The next is *Acherly* v. *Vernon*, 1 *P. Wms.* 783.

By the will that was not a vested legacy, but made so by the codicil.

The question was, whether Miss *Acherley* was intitled to the interest of the 6000 *l.* before 21.

Lord *Macclesfield* gave it as his opinion she was.

Besides, Mr. *Vernon* put himself in the place of a parent, for she was the daughter of his only sister and heir at law, and he calls it *a portion*, therefore there were strong circumstances to make it a vested legacy; but the governing circumstance was this, that the testator had directed the residue to be laid out in land *after the debts and legacies were paid*; and Lord *Macclesfield* was of opinion, till debts and legacies were paid, nothing was to be laid out in land.

The question is, whether any of these cases govern the present, and I am of opinion they do not, therefore the will must be taken into consideration.

The legatees are mere strangers to the testator, and therefore it is plain he intended they should be contingent, and to wait the event of their attaining 21.

(1) *Ante* 1 vol. 508. S. C.

(2) See *Purse* v. *Snaplin*, *ante* 1 vol. 414. note 1.

If

If the testator had stopped after the words, in case they should attain their age of 21 and not otherwise, I should have thought it had not been merely a postponing by reason of their nonage, and for the legatees' conveniency, but that he intended they should not vest till 21; but he goes on, and in case any of them should happen to die before they attain their respective ages of 21, that then and in such case the legacies so given to them respectively shall be utterly void and of no effect. HEATH v. PERRY.

The legacies are merely contingent, and directed to sink and merge; this plainly shews nothing was to be taken out for their benefit, but that it should remain where it was, at home, as part of the old estate.

There could be no doubt, unless for the following clause, which is what the plaintiff chiefly depends upon.

"I do hereby give my executors full power and liberty during the respective minorities of the five legatees, &c. (*see the clause.*)

It has been insisted for the plaintiff, that this clause brings it to the case of *Acherley* v. *Vernon*, and *Bourne* v. *Tynt*; and that though they should not be intitled to the interest now, yet it shall accumulate in the mean time, till they arrive at their ages of 21.

If there had been a particular direction for the benefit of the legatees by name, there might have been some weight in it.

I lay no stress upon its being a power, for I do not take this to be a direction to lay it out for the benefit of the particular legatees, but equally for the benefit of the residuary legatees.

For the purposes and upon the trusts, &c.

What is the meaning of this? Why, to answer all the provisions of the will, as well for the residuary as the other legatees.

Therefore there was no obligation upon the executors to sever a particular sum of money to answer the legacies for the plaintiff, and other particular legatees.

But it is stronger still, for he directs the executors either to call in, or to continue the securities they should find standing out [105] at his death, which empowers them to do it without any regard either to the interest of residuary legatee, or the particular legatees.

There is another thing, which shews that the testator knew he had given them as contingent legacies, for he expresly calls them contingent in this clause.

Therefore, I am of opinion, that the residuary legatee is intitled to the interest in the mean time; nor are the plaintiffs intitled to have the principal particularly secured to them, till they shall arrive at their ages of 21, but to be laid out for the benefit of all the legatees. (1).

(1) The words of the decree in the Register's book are "that what shall be "coming for the plaintiff's said two legacies *be placed out at interest upon government or real securities* subject to the contingencies in the said testator's will." *Reg. Lib. A.* 1743. fol. 684. Indeed it seems now to be settled that whether a legacy be vested or contingent, the legatee may have it appropriated for his benefit. *Phillips* v. *Annesley*, *ante* 2 vol. 58. *Johnson* v. *De la Creuse*, 1 *Bro. Cha*

Rep. 105. 1 *Vef.* 282. S. C. *Ferrand* v. *Prentice*, *Amb.* 273. 1 *Bro. Cha. Rep.* 105. S. C. *Green* v. *Pigot* 1 *Bro. Cha. Rep.* 103. *Cary* v. *Afkew*, 2 *Bro. Cha. Rep.* 58. *Cooper* v. *Douglas*, 2 *Bro. Cha. Rep.* 231. *Hutcheson* v. *Hammond*, 3 *Bro. Cha. Rep.* 128. 144.

Cafe 39. *Swanton* verfus *Raven*, *July* 10, 1744.

A fine by hufband and wife of her lands to a purchafer, but the ufes declared by the hufband only, no. other deed being fhewen declaring different ufes, and the ufes declared not varying from what the wife intended, it fhall bind her notwithftanding.

A Hufband and wife join in a fine of the wife's lands to a purchafer, and afterwards the hufband alone declares the ufes of it by articles.

The queftion is, Whether it fhall bind the wife?

LORD CHANCELLOR,

As no other deed is fhewn that declares different ufes, and the ufes declared do not vary from what the wife intended, it fhall bind her notwithftanding; and therefore the bill which fhe has brought, after an acquiefcence of fifteen years fince her hufband's death, for poffeffion, on fuggeftion that fhe is not bound by the fine, as fhe did not join in the articles with the hufband in the declaration of the ufes, muft be difmiffed. (1).

(1) *Vide Beckwith*'s *Cafe*, *Moor*, 197. *Moore*, 22. *pl.* 73. *Dyer*, 290. *a. pl.* 61. 2 *Co.* 57. *a.* 2 *Roll's Ab.* 798. *Anon.*

Cafe 40. *Lacon* verfus *Briggs*, *July* 11, 1744.

An executor of a houfe fteward to Lord *Bradford*, after an acquiefcence of 17 years, fets up a demand for a large fum due for bufinefs done by his teftator, to which the reprefentative of Lord *Bradford* infifted on the ftatute of limitations. *Satisfaction to be prefumed from the length of time, for it is not to be imagined, if any thing was really due to the plaintiff, that he would have been quiet under it.*

THE bill was brought to be let in as a creditor on Lord *Bradford*'s eftates under a direction in a former caufe.

The plaintiff, adminiftrator *de bonis non* to his father, who was fteward or attorney to *Henry* Earl of *Bradford*, from the year 1710 to 1717, infifts that his father had feveral large fums of money due to him, but knowing Lord *Bradford*'s averfion to bufinefs, did not care to prefs him to fettle accounts, efpecially as Lord *Bradford*, who was lord lieutenant of the county of *Salop*, had promifed to make him clerk of the peace.

[106] The defendant Sir *Hugh Briggs*, executor of Lord *Bradford*, infifts upon the ftatute of limitations.

Mr. Attorney General, counfel for the plaintiff, argued, that fuppofing the ftatute of limitations is run, yet, that my Lord *Bradford*'s will creating a truft of his real eftate for the payment of his debts, has taken it out of the ftatute; for notwithftanding the plaintiff may be barred at law, yet in equity it is a debt in confcience, and the will is in the nature of a new affumpfit.

Lord

LACON v. BRIGGS.

Lord *Hardwicke* put it upon the defendant's counſel, to ſhew how this caſe differs from thoſe where a truſt for payment of debts has revived the debt.

Mr. Solicitor General, for the truſtees, ſaid, that it muſt be a certain clear debt, and not depending on an account, which a court of equity will admit to be a debt, on ſuch a truſt-eſtate, and to be taken out by it from the ſtatute of limitations.

From the death of *Lacon* to the death of Lord *Bradford* is no leſs than ſeventeen years.

For *Lacon* died in 1717, and Lord *Bradford* in 1734, and there is no proof of any application for the pretended debt, but they have acquieſced all this time.

Another objection, he inſiſted, muſt be the expenſiveneſs of taking an account of ſuch length; and that the ſtaleneſs and improbability of the demand, would make the court very unwilling to direct ſuch an account.

My Lord *Bradford*'s executors cannot, after ſuch length of time, check *Lacon*'s accounts.

It is not poſſible to imagine, that the plaintiff would have lain by ſo many years, if there had been any thing really due, and therefore this alone is a ſtrong argument for the defendants.

Mr. *Brown*, in reply for the plaintiff, ſaid, none of the truſtees have pretended that they have found a ſtated account among my Lord *Bradford*s papers, which is a preſumption that there is no ſuch account; for if they had diſcovered any ſuch, they would not have reſted altogether on the ſtatute of limitations.

LORD CHANCELLOR.

An account is demanded at ſecond hand by the repreſentative of a houſe ſteward, and it has been inſiſted, that there is an open one between him and his lord.

I am of opinion, that if I ſhould decree an account to be taken in this caſe, I ſhould make one of the worſt precedents that a court of equity can make, for diſturbing the peace of families. [107]

It is a demand clearly barred by the ſtatute of limitations, both in law and equity.

The defendant, in his anſwer, admits, that Mr. *Dovey* might tell him, who was the executor of *Lacon*, after the death of the Earl of *Bradford*, that there was ſuch an account depending, and money due to *Lacon*.

But then Sir *Hugh Briggs* very cautiouſly confines his belief of the debt to the information of *Dovey*, and at the ſame time inſiſts on the ſtatute.

Now there muſt be a direct admiſſion of a debt, *to take it out of the ſtatute of limitations*; though there have been ſeveral caſes at law where this has not been held ſufficient, unleſs it is likewiſe

To take a debt out of the ſtatute of limitations, there muſt be *a direct admiſſion of it*, and in ſeveral caſes it has been held there muſt be *an expreſs promiſe to pay*.

Lacon v. Briggs.

wife attended with *an express promise to pay* (1); but that may be rather too hard (2).

What the executor says here, is only his personal belief, and notwithstanding, he insists on the statute of limitations in behalf of his testator.

For if a man says, that a creditor told him there was something due, he may give credit to it from the opinion he has of his veracity; and yet if he insists on the statute, that will, notwithstanding, be a bar to the demand.

The second question is, on the trust created on the real estate of the Earl of *Bradford*.

A trust for payment of debts has been held to revive such ... have been barred by the statute of limitations, but tho' now established in equity, judges have always murmured at it.

It is very true, where there is a trust of a real estate for payment of debts, it has been held, *to revive debts which have been barred by the statute of limitations, and that they are intitled to be paid as well as the other creditors* (3).

But I have often wondered how this rule at first prevailed, and judges have always grumbled at it, though it is now established in equity. *Vide Lord Strafford's case, in the House of Lords, February* 7, 1727.

Where real estate has been affected by such stale debts, it is in a plain case, and not where it depends on an account to be taken.

It has been truly said, that where real estate has been affected by such stale debts, it is in a plain and clear case, and not to be charged in so loose a manner as this is, with a debt that must depend *upon an account to be taken*.

[108]

There is no evidence of any demand, or settling accounts in the life-time of the steward, nor of any demand or request to settle the account, from the death of the steward to Lord *Bradford*'s death, which is seventeen years.

It is not probable any thing could be due to Mr. *Lacon*; all that is pretended is, that *Dovey*, his executor, had the admission of one of the trustees, that it was a just debt.

The court, in such a case as this, ought to presume satisfaction from length of time, because it cannot be imagined, if any thing was really due to *Lacon*, that he would have been quiet under it (4).

The court, would lay the party under such difficulties in taking this account, that it would be unequitable to direct it upon no other grounds, but from the latitude and extensive construction which courts of equity have put upon trust on lands for payment of debts.

(1) *Bland* v. *Haselrig*, 2 *Vent.* 151. *Dean* v. *Crane*, 1. *Salk.* 28.

(2) See *Yea* v. *Fouraker*, 2 *Bur.* 1099 *Cowp.* 548.

(3) *Vide Blakeway* v. *Strafford*, 2 *P. W.* 373. *Jones* v. *Stafford*, 3 *P. W.* 89. *Anon.* 1 *Salk.* 154. *Gofton* v. *Mill*, 2. *Vern.* 141. *Andrews* v. *Brown*, *Prec, Cha.* 385. *Vaughban* v. *Guy*, *Mos.* 245. *Legastick* v. *Cowne*, *ibid* 391. *Trueman* v. *Fenton*, *Cowp.* 548. *Oughterloney* v. *Powis*, *Amb.* 231.

(4) *Vide Sturt* v. *Mellish*, *ante* 2 vol. 610.

Besides,

Besides, as *Lacon* was a domestick steward, there must have been several large sums of money received and paid, without any writing or vouchers between Lord *Bradford* and *Lacon*. LACON v. BRIGGS.

Therefore it is impossible to direct an account, without injustice being done to the defendants in taking the account.

Upon all the circumstances then, and after such great length of time, I am of opinion, that this bill ought to be dismissed; and it has been truly said, that it will be charity to the parties not to direct such an account; but in consideration of Sir *Hugh Brigg*'s admission, that on the information of *Dovey*, he did believe there might be a balance to *Lacon*, I will dismiss the bill without costs.

The Attorney General versus *Price*, *July* 13, 1744. Case 41.

AN information has been brought relating to the school of *Barkhampstead*, a charity founded the second and third years of *Edward* the Sixth, by act of parliament.

The jurisdiction of this court over charities does not extend to such where local visitors are appointed, for then he and his heirs have a right.

LORD CHANCELLOR,

Though this court has a general jurisdiction over charities, by issuing a commission, and likewise can give directions for the management of a charity; yet this does not extend to charity-schools, where local visitors are appointed. [109]

If there is a private visitor, then he and his heirs have a right (1).

If there is a publick endowment by the crown, then a commission may issue from this court to inspect the charity, and the application of the money.

But if by letters patent, or an act of parliament, a local visitor is appointed, this court cannot interpose (2).

The warden of all Souls is the visitor here (3); but the misfortune of this case has been, the reward is so small to the visitor, only thirteen shillings and four-pence, that he has never thought it worth while to exercise his visitatorial authority; I may possibly give the visitor an augmentation hereafter: Local visitors do not visit but from three years to three years, yet they may, if they please, hear complaints within that time.

Local visitors do not visit but from 3 years to 3 years, yet, if they please, may hear complaints within that time.

This is a school of a very noble foundation, and ought to be taken care of: but I do not see any evidence of improper behaviour in the school-master and usher.

All that is proved, is a decrease of scholars, but that declension does not necessarily arise from the misbehaviour of the schoolmaster or usher; for this may depend upon a superior or inferior ability in them.

(1) *Vide Green* v. *Rutherford*, 1 *Vef.* 472. *Attorney General* v. *Middleton*, 2 *Vef.* 328.

(2) *Attorney General* v. *Governors of Harrow School*, 2 *Vef.* 552. *Attorney General* v. *Corporation of Bedford*, *ibid.* 505.

(3) *Attorney General* v. *Lock*, *post.* 165.

ATTORNEY GENERAL v. PRICE.

There is evidence, befides, that there is another fchool for teaching *Englifh* and arithmetick, which has been a diminution of this fchool in refpect to number, parents chufing rather to fend their children there.

To fend children of a lower fort to a *Latin* fchool, gives them a wrong turn, as it takes off their inclination to hufbandry and trade.

I think them very much in the right of it; for fending children of the lower fort of people to a *Latin* fchool, gives them a wrong turn, and takes off their inclination to hufbandry and trade, which is more fuitable to their degree in the world.

Therefore as to this part, the information muft be difmiffed with cofts.

Next, As to the account.

The poor are intitled to the furplus, after the mafter and ufher's ftipends are paid, and repairs. There are twelve leafes expired, and if not let, I muft prefume that the mafter and ufher of the fchool have received the rents ever fince, who are made a corporation for that purpofe.

[110] However, I can direct the Mafter to inquire what repairs are neceffary, and to make the mafter and ufher all juft allowances.

As to letting the leafes for the future, one confideration is, whether I fhall let for the improved rent, or direct fines to be taken; and I fhall have a regard to the poor; and to prevent the rich from taking it to themfelves, I will order the furplus fhall be paid to fuch poor as are not maintained by the parifh.

I will leave it to the Mafter, to inquire, whether letting on improved rent, or leafing upon fines, be for the benefit of the charity, fince a great deal depends upon the cuftom of the country.

The leafes I direct to be let to the beft bidder; and whether upon fines, or the improved rack-rent, proper covenants to be inferted for the tenants to keep the houfes in repair, and to pay all the charges of fuch repairs.

I will referve the confideration, whether the court is empowered to augment the ftipends of the mafter and ufher, and in what proportion, till the caufe comes back again after the report.

Cafe 42. *Jones* verfus *Jones*, *July* 16, 1744.

S. C. poft. 217. Semb.

A bill charges forgery in a leafe, and prays to be relieved againft that, but by way of inducement only, mentions there were fraudulent circumftances attending this cafe, without making it a diftinct charge from the forgery, or bringing the truftees who were parties to the leafe, and to whom the fraud is imputed, before the court, and for want of this, the defendant's counfel objected to the plaintiff's going on with the caufe. *Lord Hardwicke faid, as there had been already a decretal order, and an iffue to try the forgery, and brought on now upon the equity referved; the only method to affift this cafe was, to let the caufe ftand over and to allow the plaintiff, on paying the cofts of the day, to bring a fupplemental bill, in which he may charge the fraud, and make the truftees parties.*

THE bill was brought to fet afide a leafe for forgery, and charges no other fact againft the defendant, but by way of inducement only, that there were fraudulent circumftances

attending

attending this case; but the plaintiff does not by the bill make it a clear and distinct charge from the forgery; and besides, prays to be relieved only as to the forgery.

JONES v. JONES.

It was objected by the defendant's counsel, that the plaintiff cannot go on upon this part of the case, because they have not put it properly in issue, so that the defendant has had no opportunity of applying his defence, or giving any answer to the pretended fraud and imposition; and besides, if there is any fraud insisted to be in the trustees, who were parties to the lease, and who have been guilty of a breach of trust in not carrying the trusts into execution, the plaintiff ought to have made them parties to the suit.

LORD CHANCELLOR, [111]

An objection for want of parties, must be upon opening the proceedings, and before the merits are disclosed.

This cause has been brought on very oddly; and the objection for want of parties comes very late; for the rule is, that it ought to be upon opening the proceedings, and before the merits are disclosed.

But it is frequently known, that after a cause is gone into, and even thoroughly heard, yet the court is compelled to let it stand over, for want of parties.

Sir *Joseph Jekyll* dismissed a bill for want of parties; on appeal Lord Chancellor *King* reversed that order; and ever since, causes are directed to stand over only on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties.

Therefore the objection, though it is not taken in time, must have its weight, because, otherwise, the court cannot, on the one hand, do justice to the defendant, and on the other, I should be obliged to dismiss the bill, which is never done now, though it was attempted by Sir *Joseph Jekyll* formerly, but reversed on an appeal to Lord Chancellor *King*; and since that time, causes are ordered only to stand over on paying the costs of the day, that the plaintiff may have an opportunity of making proper parties (1).

In this case, after there has been one hearing already, and an issue directed to try the forgery, and the cause brought on upon the equity reserved, the objection is now made for want of parties, and not before.

As here has been then a decretal order, and there cannot be a new examination in the cause, as it is closed, and publication past, all that I can do to assist this case, is, by giving the plaintiff leave to bring a supplemental bill, and make a distinct charge of the fraud, and the trustees parties.

Had the bill stated both points of relief distinctly, the plaintiff might, when the cause came on upon the equity reserved, have proceeded on the charge of fraud, though he had failed in setting aside the deed for forgery.

If the bill, which is now at hearing, had been properly framed, that is, if it had stated both the points of relief plainly and clearly; first, the forgery; and then, if the lease was not forged, yet that it was fraudulent; there, though the plaintiff had not prevailed to set aside the deed for forgery, he might have proceeded on the point of the fraud.

(1) So *Anon. ante* 2 vol. 15. *Green* v. *Poole*, 4 *Bro. Par. Ca.* 122. *Sed vide Stafford* v. *City of London*, 1 *P. W.* 428. *Vide etiam Woodcock* v. *King*, *ante* 1 vol. 286.

Jones v. Jones.

I remember a case before Lord *Macclesfield*, who directed an issue on the forgery, and the deed being found not to be forged my Lord *Macclesfield* permitted the plaintiff, when it came on upon the equity reserved, to proceed on the fraud, because the charges in the bill were distinct.

But here there is no other fact charged but the forgery, and I must not surprise the defendant, who had no notice of the lease, being impeached for fraud, and therefore is not prepared with any defence as to the fraud.

[112] It has been objected, there is no receipt given on the back of the lease, for the consideration of three hundred and fifty pounds.

But it is not very usual to give receipts for fines on the back of a lease.

Now, it is insisted by the defendant's counsel, the trustees ought to be made parties, that, if the plaintiff prevail, the defendant may have relief over against them who have been guilty of a breach of trust, if they have not applied the 350*l.* towards the execution of the trust.

There is another point on the general head, which intitles the defendant to have the trustees before the court, and that is, if the defendant should appear to have paid the trustees the three hundred and fifty pounds, as he insists he did, and it is no answer, to say, that the defendant ought to have brought a cross bill.

For when a person brings a bill to set aside a deed for forgery, fraud, and imposition, it is his business to have all proper parties before the court, and the defendants are not obliged to bring a cross bill.

As this bill is framed, the defendant was excusable for not making his objection, for want of parties, sooner, and therefore I shall direct the cause to stand over, and the plaintiff to pay the costs of the day, and thereupon leave him at liberty to bring a supplemental bill, and to make the trustees, or the representatives of them, parties, who joined in the lease of the first of *September* 1716, and his Lordship directed accordingly.

Case 43. *The Attorney General* versus *Milner*, *July* 18, 1744, *at the Rolls*.

As the legacy to *E. L.* under the will of *A. S.* was to be paid out of a real estate, and he is dead before the contingency happened, on which he was to take, this case is within the general rule, and ought to sink in favour of the heir at law (1).

ANNE Smith by her will, amongst other legacies, "gives "to three trustees, eight thousand pounds upon trust, that "they should dispose thereof in the purchase of lands of inheritance in fee-simple, to be settled to the use of her

(1) *Prowse* v. *Abingdon*, *ante*, 1 vol. 482. *Van* v. *Clarke*, *ante*, 1 vol. 512. *Boycett* v. *Cotton*, *ante*, 1 vol. 555.

"grandson

"grandson *Thomas Milner*, and the heirs of his body; and for "default of such issue, directed the trustees to convey the "same to the Drapers Company, upon trust that they should "within three months after the estate should be conveyed to "them, *by mortgage, or sale of some part thereof, raise, and* "*pay to* Edward Lynch, *her nephew, two thousand pounds, which* "*she bequeathed to him, in case of the death of her grandson without* "*issue* (1); and that they should dispose of so much of the rents "of such estate, after payment of the two thousand pounds, as "should be necessary for purchasing a convenient piece of ground "for a charity, and till the purchase could be made, the interest "of the money was to go as the profits of the land: and by her "codicil taking notice she had given six thousand pounds to the "charity, she thereby gives only five thousand pounds." [113]

(2) *Edward Lynch* died the 29th of *April*, 1738, and one *Hill* was administrator to him.

Thomas Milner the grandson died in *May*, 1742, under the age of twenty-one, and without issue.

The question now was, Whether this legacy of two thousand pounds was lapsed, as *Edward Lynch* died before the contingency happened, or whether it is transmissible to his representative.

It was insisted on for the representative of *Lynch*, that though the fund out of which this legacy is payable is to be considered as land, and the legacy a charge upon it, yet with regard to the legatee it must be looked upon as a sum of money: upon the falling out of the contingency that it vested, and was consequently transmissible, and for that purpose the following cases were cited, *Eames* versus *Hancock*, the 19th of *February*, 1742 (3), before Lord *Hardwicke*, *Pinbury* versus *Elkin*, 1 *P. Wms.* 563. *King* versus *Withers*, *Trin.* term, 1735, *Cas. in Lord Talbot's time*, 117. *Buckley* versus *Stanlake* at the Rolls, the 6th of *December*, 1715. 2 *Ventr.* 347.

For the heir at law and administrator of *Milner* the grandson, it was insisted that the question depends upon the nature of the devise itself, and the rule of the court falling in with the disposition that is made: for this is a pecuniary legacy to be raised and paid out of land, and the constant rule is, that if the legatee does not survive the time of payment, it cannot be raised for his representative: this it was said was undeniably the case with regard to portions; and there is no difference where the legacy is given to a child or a stranger. In support of which was cited *Hall*

(1) These words in Italics are omitted in the Register's book, though it is evident, that the chief point in the case was determined upon this part of the will.

(2) "There was a former decree in "this cause, which declared as to the "8000*l.* that it was to be considered as "a legacy of 8000*l.* with respect to *Milner* the grandson; but in case he "should die without issue and without "aliening it, then as between the relators and *Edward Lynch*, it was to be "considered as a legacy of 7000*l.* After "this decree the suit abated by the death "of *Edward Lynch.*"

(3) *Ante*, 2 vol. 507. S. C.

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verſus *Terry*, 8 *November*, 1738. *Van* and *Clarke*, 21 *July*, 1730. both before Lord *Hardwicke*; for the 1ſt *vide* 1 *Tra. Atkyns* 502. and for the laſt *vide* 1 *Tra. Atkyns* 510.

Maſter of the Rolls (*Forteſcue*). He ſtated the words of the will, and then ſaid the only queſtion upon it was between the repreſentative of *Edward Lynch*, and the heir at law, whether this two thouſand pounds ſhall ſink into the real eſtate or go to the repreſentative of *Lynch*.

The former decree does not determine this queſtion, but declares the deviſe over to *Lynch* is not upon too remote a contingency; but his death happening in the life-time of *Thomas Milner* the grandſon, and before the contingency fell out, brings on the preſent point.

[114]

It muſt be firſt conſidered, whether this two thouſand pounds ought to be looked upon as given out of a real eſtate.

Money directed to be laid out in land, is conſidered as land, and the intereſt goes as the profits would after a purchaſe.

The expreſs deviſe is, that eight thouſand pounds ſhall be laid out in land, and veſted in truſtees for the ſeveral uſes mentioned in the will: the intent of the teſtatrix was, that it ſhould be ſettled as land: and it is the conſtant rule of the court that when money is directed to be laid out in land, it ſhall be conſidered as land (1), and the intereſt is directed to go as the profits of the land would till a purchaſe made.

It cannot be conſidered as money in reſpect to the legatee, becauſe the will directs it ſhall be raiſed by *mortgage* or *ſale*, which ſhews it muſt be out of land.

It is ſaid, though this ſhould be looked upon as land, with regard to the heir at law, yet as to the legatee it ſhould be conſidered as money; but I think that cannot be in this caſe, becauſe the teſtatrix directs it ſhall be raiſed by mortgage or ſale, which ſhews it muſt be out of land: and the determination muſt be the ſame with reſpect to the legatee as to the heir at law; the heir at law will indeed have the advantage of it, as I am of opinion it muſt be conſidered as if to be raiſed out of land.

The ſecond queſtion is, Whether this is ſuch a legacy as ought to go to the repreſentative of *Edward Lynch*, or ſink in the real eſtate for the benefit of the heir at law?

It is inſiſted by Mr. *Hill's* counſel, that this is a veſted legacy in *Lynch*, and that though he died before *Thomas Milner*, it ought to go to his repreſentative; the words of the will are, *that the Drapers Company ſhall raiſe by mortgage or ſale if Thomas Milner dies without iſſue*, &c.

Where a deviſe is annexed to a legacy, if the perſon dies before the time comes, it is lapſed; but if given to a legatee, and to be paid at a future time, there, as it depends on the payment, and not the legacy, it ſhall veſt immediately.

The conſtant rule of conſtruction is, that if a legacy is given to the legatee to be paid at a diſtant time, as it depends upon the payment, and not the legacy, it ſhall veſt; but if the deviſe is not annexed to the time but the legacy, in that caſe if he dies before that time is come, it is a lapſed legacy (2).

(1) Vide *Trelawney* v. *Booth*, ante, 2 vol. 307. *Guidot* v. *Guidot*, *poſt* 254.

(2) Vide *Lowther* v. *Condon*, ante, 2 vol. 126. *Shemmar* v. *Collins*, *poſt*. 319.

As

As to this, it is plainly not given till after the death of *Thomas Milner* without issue, because the estate was given to the Drapers Company *upon his death without issue*, so that the time seems to be annexed to the legacy, and not given in general to be paid upon that contingency: and I am not clear whether that would be such a vested legacy as would go to the representative.

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As the estate is devised to the Drapers Company only in case of the death of *T. M.* without issue, and the legacy to *E. L.* upon the same event, the time seems to be annexed to the legacy, and not given in general to be paid upon that contingency.

But I shall consider it as if it was a legacy given to him, but to be paid at a distant time. [115]

In that light the question will be, Whether, as it is to be paid out of a real estate, and not out of a personal estate, the representative can take?

The general rule is, that if it was to be paid out of a personal estate, it would be a vested legacy and transmissible: but as far as it is to be paid out of land it will have another construction, and will sink into the land for the benefit of the heir at law; and the rule of the ecclesiastical law is followed as to its being vested though to be paid at a future day, if it is payable out of the personal estate.

In *Chandos* versus *Talbot*, 2 *P. Wms.* 610. *Hall* versus *Terry* (1), upon a devise out of land the legacy was decreed to be void.

In *Van* versus *Clark* (2) it was decreed not to be raised, though given out of a mixed fund.

Atkins versus *Hiccocks* (3) was indeed by way of portion, and to be paid upon marriage, and therefore not quite so strong for the present purpose.

With regard to childrens' portions, the rule of the court has been, that where the child dies before it becomes payable, it shall sink into the land.

Pawlet versus *Pawlet* (4), *Yates* versus *Fettyplace* (5), are to that purpose.

And if the rule is, that a legacy out of land, given as a portion to a child who dies before the contingency happens, shall go to the heir, and not to the representative of the child, I think it is much stronger where the legacy is given to a stranger payable out of land.

If a child, who has a legacy payable out of land dies before the contingency happens, it goes to the heir; *a fortiori* where it is given to a stranger.

Several cases have been cited to shew, that the court upon many occasions varied from this general rule.

King and *Withers* (6) is the case of the greatest authority, and most relied on.

(1) *Ante* 1 vol. 502. S. C.
(2) *Ante* 1 vol. 512. S. C.
(3) *Ante* 1 vol. 500. S. C.
(4) 1 *Vern.* 204. S. C. 2 *Vent.* 366.
(5) 2 *Vern.* 416. S. C.
(6) *Ca. temp. Talb.* 117. S. C.

But

The Attorney General v. Milner.

But there is a claufe in that will which fhews the 3500 *l.* additional portion was to be paid in all events whenever the contingency fhould happen, and the lands were chargeable with it whenever it became payable.

And there Lord Chancellor faid it was different from all the cafes cited with regard to childrens' portions: for in thofe the
[116] children died before it became payable, and before they wanted it; here fhe had both married, and was of age, and his Lordfhip did not controvert the general rule where the death happens before the portion becomes payable. This was to go in addition of the portion, and might advance her in marriage, as the hufband might look upon that contingency as part of her fortune.

Therefore this is different from the prefent cafe, because *Edward Lynch* did not live till the time when it was directed to be paid; that was the cafe of a child's portion, *Edward Lynch* is quite a ftranger, and the confideration of marriage is not an ingredient in the cafe.

Pinbury and *Elkin* (1), and the cafe in 2 *Ventris* (2), were legacies payable out of perfonal eftate, and not out of land, and therefore are no authorities.

Bulkley verfus *Stanlake* was a devife out of land, a rectory for lives, and it was decreed there the legacy fhould be paid; but it differs from this, becaufe the wife by will devifed the fame eftate to new truftees to difpofe of for the beft price, and to pay the debts and legacies of her hufband not paid before her death: She had the fole right to the rectory, and fhe gave it upon that particular truft; it could have no other conftruction but that, and it muft be paid to the reprefentatives of the legatees, as they were dead before her devife, though fubfequent to that of her hufband's.

In *Eames* verfus *Hancock* (3) there was a claufe of entry, and it was decreed not to be a lapfed legacy, but that it fhould go to the reprefentative of *Elizabeth*: but the giving the power of entry was as much as giving a term of years till payment, and was a chattel intereft that fhould go to the executors.

The prefent cafe does not come within any of the cafes cited to diftinguifh it out of the general rule; and though it is fuch a legacy as might be vefted in *Edward Lynch*, and fuch as would go to his reprefentative if it was to be paid out of perfonal eftate, yet as this is to be paid out of a real eftate, it is within the general rule, and ought to fink in favour of the heir at law (4).

(1) 1 *P. W.* 563. S. C.
(2) *Anon.* 2 *Vent.* 347.
(3) *Ante* 2 vol. 507. S. C.
(4) His Lordfhip doth declare, that the reprefentative of *Edward Lynch* is not entitled to the 2000 *l.* bequeathed to him by the will of the faid teftatrix, and that the fame ought to be confidered as belonging to *Robert Milner* as heir at law and adminiftrator of *Thomas Milner* the late infant deceafed. *Reg. Lib. A.* 1743. fol. 619.

Uvedale verſus *Uvedale*, *July* 20, 1744. Caſe 44.

J. W. by his will directs his real eſtate to be ſold after his wife's death, and the money ariſing therefrom, to be equally divided between *R. U.* and five other perſons; the bill is brought by the widow for a ſale; *R. U.* is an infant and as heir at law to the teſtator had the legal intereſt in the eſtates. *Though the uſual practice is for the parol to demur till the infant come of age, yet it being for his intereſt that it ſhould be ſold, and as in this caſe there was a truſt to be performed, and the court can ſee to a proper application of the money, Lord Hardwicke decreed a ſale, but declared at the ſame time he did not mean by this direction to break in upon the rule of the parol demurring.*

" JAMES Uvedale made his will dated the 22d of *February* 1736, therein reciting, that he had by leaſe and releaſe conveyed to truſtees the ſeveral eſtates therein mentioned, in truſt for the plaintiff the widow as a jointure; he thereby confirms the ſame, and wills that ſhe ſhould have the rents, &c. of the ſaid lands, &c. during her life, according to the deeds, *and after her death wills that the ſame ſhould be ſold*, and the money ariſing by ſale thereof, to be equally divided between his nephew *Robert Uvedale*, and five other perſons, ſhare and ſhare alike, and in caſe of any of their deaths before the ſale, their ſhares to go to their children, and if no children, to be at their own diſpoſal."

The bill was brought by the widow of the teſtator to have the real eſtate of *James Uvedale* ſold, or ſo much thereof as ſhall be ſufficient to ſatisfy the plaintiff's demand.

The plaintiff had fifteen hundred pounds to her fortune, and before marriage *James Uvedale* the huſband covenanted with truſtees that he would pay to them fifteen hundred pounds (1), to be laid out in the purchaſe of lands for her jointure.

He in his life-time (2) laid out money to the amount of two thouſand eight hundred and fifty-one pounds, in the purchaſe of lands, and makes a ſettlement of theſe lands on the plaintiff for her jointure (3).

The plaintiff after her huſband's death refuſed to enter on the jointured eſtate, but inſiſted that the teſtator had made the purchaſe for his own convenience, without the conſent of her truſtees, and that ſhe was not obliged to accept the lands ſo purchaſed in performance of the articles, but that they ought to be ſold, and the money ariſing thereby, together with ſo much of the teſtator's perſonal eſtate as would be ſufficient for that purpoſe, ſhould be laid out in purchaſe of other lands.

The defendant *Robert Uvedale*, one of the deviſees of the teſtator's real eſtate, is an infant, and as heir at law to the teſtator has the legal intereſt in the eſtate.

It came on before the Chancellor on exceptions, and it was allowed by all the parties to be for the intereſt of the infant that the eſtate ſhould be ſold; but the doubt was, whether according to the rule of the court it can be directed, for the practice is for *the parol to demur* till the infant comes of age. [118]

(1) " Which with 1500*l.* the wife's fortune, the truſtees were with the wife's conſent to lay out in the purchaſe of lands for her jointure."

(2) And after the marriage.

(3) The plaintiff was a party to, and executed this deed.

LORD

UVEDALE v. UVEDALE.

LORD CHANCELLOR,

The principal question is, Whether the court can decree a sale, or whether *the parol must demur*, till the defendant *Robert Uvedale* the infant comes of age.

Now this is extremely desirable, if it can be attained, and the court will go as far as possible to do it: and I am in hopes the court may come at it in the case before them.

The will takes the lands to be settled, but the settlement will not alter the case; for though it gives an estate for life, it does not break the descent: for it is not material whether the infant takes an immediate inheritance, or expectant upon an estate for life, for the court can decree a sale of a reversion, as well as of an estate in possession.

Now, if this had been a devise of a remainder or reversion to trustees to sell, the difficulty would have been removed, for the court then would have directed them to sell, and given the infant a day to shew cause.

But this is not the case, for the estate is descended on him, and he has taken the legal estate by descent, subject to the purposes of the trust (1).

The wife renounces the estate for life, under the will, which will put this out of the case; the words *after her decease* were not put in to postpone the sale.

But the question still recurs, Whether the estate may be sold when it is upon the bill of a specialty creditor prayed to be sold.

The plaintiff's bill is not merely for the satisfaction of a specialty debt, but for the performance of a trust likewise.

But this will not alter the case, for still it is as to the infant a demand for payment of a specialty debt.

What distinguishes it from the common case is, that here is a specialty creditor, who is intitled to a satisfaction out of the real estate, before the trust for the sale can be performed.

And the *cestui que trusts* are likewise intitled to have this estate

[119] sold, and the court is only to take care to have the money arising from the sale properly applied.

I go upon this, that it may be remembered I do not give this direction to break in upon the rule of *the parol demurring for an infant* (2), that as here is a trust (3) to be performed, I think I may decree a sale (4), as here the application of the money is what the court is principally to take care of in this case.

The sum of three thousand pounds arising from the sale must be directed to be laid out in the purchase of lands, to be settled to the uses in the articles.

(1) Equity in this case considers the lands as bound by the trust, and the heir, in whom the legal estate is vested, as a trustee. See Mr. *Hargrave*'s note to *Co. Litt.* under fol. 114. a.

(2) *Chaplin* v. *Chaplin*, 3 *P. W.* 368. *Scawth* v. *Gitton*, *Ca. temp. Talb.* 198.

(3) *Vide Creed* v. *Colville*, 1 *Vern.* 173.

(4) And that the decree be binding on the infant, unless he shew cause to the contrary within six months after he comes of age.

Another

Another question is, Whether the executor can be allowed his costs of this suit.

The rule of law is, that wherever an executor is sued for a debt of a testator, the courts of law look upon it as an unjust defence, and give costs *de bonis propriis*; but in equity it is discretionary, whether they will make an executor pay costs or no; and though this may be an unfortunate case to the executor, yet he must consider with himself before he applies for the probate (1), for afterwards he must take the event; and this court, though the specialty creditor sweeps away the whole personal estate, will not let the executor reimburse himself his costs out of the real estate of the debtor, to the prejudice of his heir at law.

UVEDALE v. UVEDALE.

Where a debt of a testator is recovered against an executor at law, costs are given *de bonis propriis*, but in equity discretionary, whether they will make him pay costs or not.

The personal estate is apprehended to be deficient to satisfy the specialty debt, but if the personal assets are more than sufficient to pay this debt, the executor may then have his costs out of the residue (2).

(1) *Humphreys* v. *Morse*, *ante* 2 vol. 408. *Vide etiam Humphrys* v. *Moore*, *ante* 2 vol. 108. note.

(2) The consideration of the defendant's costs, was reserved generally 'till after the Master's report. *Reg. Lib. B.* 1743. fol. 518.

Stag versus *Punter*, *July* 23, 1744. Case 45.

UPON exceptions to a Master's report for not allowing 60*l.* for the testator's funeral:

LORD CHANCELLOR,

At law where a person dies insolvent, the rule is, that no more shall be allowed for a funeral than is necessary, at first only 40*s.* then 5 *l.* and at last 10 *l.* (1).

Though at law, where a person dies insolvent, his executor will be allowed no more for his funeral than is necessary, yet if he is led into a greater expence on this account, by seeing large legacies left by the will, which induced him to think the estate was solvent, this court will not adhere to the rule laid down at law that he must not exceed 10*l.*

I have often thought it a hard rule, even at law, as an executor is obliged to bury his testator before he can possibly know whether his assets are sufficient to pay his debts.

But this court is not bound down by such strict rules, especially when a testator leaves great sums in legacies, which is a reasonable ground for an executor to believe the estate is solvent. [120]

As this is the case here, I am of opinion that sixty pounds is not too much for the funeral expence, especially as the testator had directed his corps should be buried at a church thirty miles from the place of his death; and besides there is still another estate to be sold, so that it is not clear that there will be any deficiency; and on these circumstances his Lordship allowed the exception to the Master's report (2).

(1) Vide post. 249. (2) "As to the sum of 54 *l.*" *Reg. Lib. B.* 1743. fol. 559.

Case 46. *Jeffreys* versus *Jeffreys*, *Trinity Term*, 16 *Geo.* 2.

A. by his will bequeaths to his two daughters *Ann* and *Elizabeth* 2702 *l.* 3 *s.* capital stock in the bank of *England*, and 2000 *l.* sterling capital stock in the *English East India* company, to be equally divided between them; after making his will he sold 702 *l.* 3 *s.* of the bank stock. *The court held that the testator having the stock at the time he made his will, he meant to give that very individual stock, and the sale of part afterwards was an ademption pro tanto* (1).

THE questions in this cause arose upon the will of one *James Jeffreys*, dated the 11th of *June* 1734, in which was the following clause.

"*Imprimis*, to my two daughters now in *Dantzick*, *Ann Louisa* " *Jeffreys*, and *Elizabeth Jeffreys*, I give and bequeath two " thousand seven hundred and two pounds three shillings, ca- " pital stock in the bank of *England*, and two thousand pounds " sterling capital stock in the *English East India* Company, to be " equally divided between them.

At the time of making his will he had 2702 *l*, 3 *s*. bank stock and 2000 *l*. *East India* stock, but before his death sold seven hundred and two pounds three shillings of the bank stock, so that the testator at the time of his death had only 2000 *l*. bank stock, and 2000 *l*. *East India* stock.

The bill was brought by the daughters and legatees against the widow and executrix of the testator (who was a second wife of the testator, and by whom he had left other children, and devised to them the whole residue of his personal estate), charging that the testator had received 20,000 *l*. and upwards of their mother's estate and that what he had devised to them was the whole provision made by him for the plaintiffs, and prayed that they might be decreed to have the benefit of this devise, and that the executrix might be directed to purchase out of the other assets, which were very considerable, enough to make up the deficiency in the bank stock of the seven hundred and two pounds three shillings.

Against this the defendant the executrix insisted, that the sale of this stock by the testator in his life-time was an ademption of the devise *pro tanto*, and by her answer set forth that the plaintiffs had very large portions left to them by their grandmother, one Mrs. *Colmer* with whom the plaintiffs lived at *Dantzick*; that the testator, their father, had been at [121] great expence in bringing the plaintiffs from *Dantzick*, and in a cause in this court for recovery of what was so left to them; and upon the hearing of that cause it was, amongst other things, referred to a Master to state what was fit to be allowed for the plaintiffs' maintenance for the time past and to come, and that the Master by his report allowed a sum of upwards of 400 *l*. for the further expences, and the maintenance of the plaintiffs; but when the cause came on again upon the Master's report, it was referred back to the Master to state, whether the father was not in circumstances to maintain his

(1) *Vide Purse* v. *Snaplin*, *ante* 1 vol. 414, and the note to that case.

children, and in what manner the Master had computed the allowance, but nothing further was done in that cause; and now the defendant insisted to have this money deducted from the plaintiffs' legacies.

Master of the Rolls (Fortescue). Here are two questions made in this cause.

The first is, Whether the sale of the seven hundred and two pounds three shillings bank stock is, or is not, to be considered as an ademption *pro tanto* of the plaintiffs' legacies.

Secondly, Whether the defendant is intitled to have the allowances made to her which she hath claimed by her answer, and to have the same deducted out of the legacies.

With regard to the first, it has been said by the plaintiffs' counsel that this is not an individual specific devise of what stock the testator had at the time of making his will, but a general devise to be made good by the executor.

There is no doubt but in specific devises this distinction has been taken, that where a man devises such a quantity of corn (1) or number of sheep generally, this is not to be considered as the corn or sheep which he then had, but a devise of quantity only.

Where a man devises such a quantity of corn or number of sheep generally, it is a devise of quantity only.

But I think there is a difference between a devise of stock, and of corn or sheep.

Corn or sheep are in their nature perishable, but when a man buys stock, he buys it to have continuance as long as he lives, and therefore when he devises any quantity of corn or sheep, though he has such quantity at the time of making the will, yet he cannot, from the nature of the thing, be taken to intend that the individual quantity of corn or sheep should go to his legatee; but where he devises any quantity of stock, which in its nature is durable, and may continue in the same state to the time of his death, if he has the stock at the time, he cannot but be taken to intend that very individual stock, and if so, the sale of it is undoubtedly an ademption *pro tanto*; [122] and this is very strong in the present case, in respect that the stock devised, and the stock which he then had, agree exactly, even in the odd money. Consider then how far the cases that have been cited come up to this case.

The first case is *Ashton* versus *Ashton*, 152. *Cases in Lord Talbot's time*, which was before his Lordship in 1735, and I believe it is rightly stated in the book; but that case differs from the present: there 6000 *l. South-sea* stock was devised, when the testator had but 5360*l.* and yet held that it was a specific individual devise of the stock, and that no more should pass than what the testator left; and it was said by Lord *Talbot*, if in that case the testator had actually had as much as he devised, but before his death had sold a part, it had been an ademption *pro tanto.*

As to the testator's selling the stock at five different times, in the present case, it seems to make no difference, for he

(1) So *Abney* v. *Miller*, *ante* 2 vol. 599.

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might every time intend to diminish the legacy for so much as he sold.

The next case is that of *Partridge* versus *Partridge* (1), which was before Lord *Talbot* in 1736: there the testator devised 1000 *l.* *South-sea* stock; at the time of making the will he had 1800 *l.* stock, which he reduced afterwards to 200*l.* and then purchased 1600*l.* more; then came the act of parliament which changed three-fourths of the stock into annuities, and soon after the testator died, and what had so happened at the making of the will, was determined to occasion no ademption of the legacy, and the devise was held to be descriptive only of the nature of the thing which he intended to give, and the act of parliament was taken most clearly not to affect the legacy.

But this case differs from the present; and if his buying in could be said to restore the legacy, as it was said it did, it implies that his selling out was an ademption.

And in that case the devise was not of the particular stock that the testator had, which makes it different from this case.

As to *Purse* versus *Snaplin* (2), if the 5000*l.* stock given to one of the devisees was a specific individual devise there was no stock for the other devisee; and then, as to him, it was a devise of stock where the testator had none, and is as a direction to the executor to procure it for the legatee.

The rule is, that if a man has a debt owing, and devises it, and it is paid in voluntarily, the legacy continues.

In *Brunsden* versus *Winter* (3) the testator had more stock than was devised, and the navy bills were received in a course of payment; but here the testator sold the stock, and as to the *navy bills, I take it to be a constant rule, that if a man has a debt owing, and devises it, and it is payed in voluntarily, the legacy continues (4).

[*123]

As to the allowances claimed by the defendant, I think they ought not to be allowed.

Where maintenance is allowed, it is always paid to the father out of the child's estate, and no instance of its being deducted out of a legacy left by a father to the child.

In such cases, the usage of a court is to refer it to a Master, to see if the father is not in circumstances to maintain his children, and it is certainly the duty of a father to do it, if he can, and wherever maintenance is allowed, it is always to be paid to the father out of the child's estate, and was never known to be deducted out of a legacy left by the father to his child; besides, I cannot now take upon me to anticipate the order in the other cause, or to determine now what was not made a question there.

I must therefore decree (5) the two sums of 2000*l.* bank stock, which is all the bank stock testator hath left, and the 2000 *l.* *East India* stock to be transferred for the benefit of the plaintiffs, clear of all deductions.

(1) *Ca. temp. Talb.* 226. S. C.

(2) *Ante* 1 vol. 414. S. C.

(3) *Amb.* 57. S. C.

(4) *Vide Lawson* v. *Stich*, *ante* 1 vol. 508, and the cases cited in the note.

(5) That so much of the said bank stock and *East India* stock, as remains, be transferred to trustees in trust for the plaintiffs, and that the dividends, *which had accrued since the testator's decease*, be paid in like manner. *Reg. Lib. A.* 1742. fol. 688.

Note; In the arguing of this case at the bar, *Swinb. fol. edit.* 173, 179, 540. and 2 *Domat.* 159, 160. were cited for the plaintiffs, and the case of *Brunsden* versus *Winter* (1), which was also cited for the plaintiffs, was a devise to this effect; I devise the sum of 2000 *l.* capital *South-sea* stock, in the *South-sea* company to *A. B.* and *C. D.* my trustees, and also two navy bills, which *South-sea* stock and navy bills I direct shall be applied in the same manner as my real estates, *&c.* which were devised upon several trusts, for the benefit of the defendant Mr. *Winter's* children: the testator, at the time of making his will, had 2200 *l. South-sea* stock; afterwards the testator sold out 1625 *l.* and then came the act for annihilating, *&c.* and the question was, Whether the devise of the stock was a specific individual legacy out of the particular stock that the testator had at the time of making the will, and so the sale an ademption, or whether it was to be taken as a general legacy of so much stock which the executor ought to provide out of the residue of the testator's assets? And the *Master of the Rolls* held it to be a general legacy, to be made good by the executor; it was heard at the *Rolls* the 5th of *February*, 1738, before Mr. *Verney*. JEFFREYS v. JEFFREYS.

Upon the question, as to the allowances, Mr. Solicitor General cited the case of *The Bank of England* and *Morris*, that came first before Lord *Talbot*, and afterwards went up into the House of Lords, in which case it was first held by Lord *Talbot*, that where a father is indebted to his children, and dies, that his executor shall not be permitted to deduct any thing from the debt, in respect of maintenance of the children by the father in his life-time, though insisted on by creditors: and although this part of the decree was reversed in the House of Lords, yet it was only in favour of creditors, and not to be carried further. [124]

For the defendants were cited *Godolphin's Orph. Leg.* 411. This decree was affirmed by Lord *Hardwicke* the 21st of *April*, 1744. (2).

(1) *Amb.* 57. (2) *Reg. Lib. A.* 1743. fol. 389.

Dormer versus *Fortescue*, *April* 28, 1744. Case 47.

THIS cause came on again before the court upon the equity reserved. S. C. ante 2 vol. 282. 18 Vin. 208. pl. 2. 226. pl. 23.

21 Vin. 474. pl. 2. S. C. Clear both in law and equity, and from natural justice, that the plaintiff, from the death of his father, the time when his title accrued, is intitled to the rents and profits.

Mr. Solicitor General, counsel for the plaintiff, said, the question is, Whether this court can decree the plaintiff an account of rents and profits from the time of his title accruing, which is from the death of his father *Eusebe Dormer*, who died the 3d of *September*, 1729.

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The plaintiff was obliged to come into this court, in order to have the family settlement produced at the trial at law, for the defendant wrongfully detained it, notwithstanding he had got all the four parts in his own hands, and pleaded himself a purchaser for a valuable consideration.

Lord *Talbot*, at the hearing, directed the deed to be produced at the trial at law, in order to determine the title there, and the bill to be retained for a twelvemonth, and a term for years to be removed out of the way, and all further directions to be reserved till after the trial.

The original bill, besides, prays general relief (1).

The plaintiff's title having been established at law, he is now intitled to a complete relief, *an account of the rents and profits.*

For if he has not the rents and profits as well as the estate, he has not complete justice done.

There are cases where at law a person may not recover rents and profits, and yet this court will direct it, where it has a proper jurisdiction, as in an action for rents and profits, which is in the nature of an action of trespass, if the person dies against whom it is brought, *moritur cum personâ*, but this court will direct an account of rents and profits notwithstanding.

[125] It is said, that if the court decree an account of rents and profits, that it must begin only from the time of the supplemental bill.

But the court, wherever they decree it, do it from the time of the title's accruing.

There were no laches or neglect on the part of the plaintiff, for his father died the latter end of 1729, and the plaintiff brought his ejectments in 1731, and his original bill in 1732.

By the statute of *Gloucester*, damages in an assize are given, and after a trial in ejectment, there can be no other way of measuring the damages, but by rents and profits.

It was objected at a former hearing, that the statute of limitations has barred the plaintiff from carrying back the account any further than the filing the supplemental bill, six years having incurred before it was brought.

But when this matter came on, *March* 20, 1741, and the demurrer and plea was argued, this objection was over-ruled, and is now out of the question.

Lord Chancellor asked if the original bill charges the defendant Mr. Justice *Fortescue* to be in possession of the estate, for it is admitted that it does not pray specifically an account of rents and profits, but only general relief.

Mr. Solicitor General: The bill indeed does not charge possession in the defendant, but it sets forth that the plaintiff has brought ejectments against him.

The cases cited by Mr. Solicitor General and the rest of the counsel for the plaintiff, were *Coventry* versus *Hall*, 2 *Ch. Cas.* 134. *id. in* 2 *Rep. in Chan.* 134. *The Duke of Bolton* versus

(1) And that the deed of settlement might be deposited in court for the plaintiff's benefit. *Reg. Lib. A.* 1734. fol. 325.

Deane,

Deane, *Prec. in Eq.* 516. *Bennet* versus *Whitehead*, 2 *P. Wms.* 644. 1 *Vern. Anon.* 105. DORMER v. FORTESCUE.

After they had finished, his Lordship adjourned the cause; and on the 2d of *June*, 1744, it came on again, when Mr. Attorney General for the defendant said, that the avowed end of the original bill was not to try the right in a court of equity, for it does not pray possession, or the title-deeds to be delivered up, or the estate; neither does it ask an account of the rents and profits, nor charge the defendant with the receipt of them.

The decree of this court, and of all courts, must be *secundum allegata*, as well as *probata*. [126]

The decree has been already made for all the purposes prayed by the original bill, namely, that the deed should be produced, and a term for years removed out of the way at the trial at law.

Where the right can only be determined at law, and the plaintiff cannot come here originally for the determination of the right, there is no instance where this court will decree an account of rents and profits.

The plaintiff has gone altogether on the foundation of its being a legal right, states it so in his bill, and has not prayed the court to determine the right in any shape whatever.

The court cannot say now, that the final right to the inheritance is determined, for Mr. Justice *Fortescue* may, upon the new ejectment brought by him, recover it again; and therefore, if the court should decree an account of rent and profits, it would be decreeing at the same time, that the right is absolutely determined, and for this reason, while the ejectments are depending, this court cannot properly decree an account of rents and profits.

In the case of *Coventry* versus *Hall*, the court there decreed the rents and profits, because they had determined the right to be in the plaintiff, which differs it very much from the present case.

The plaintiff did not make an actual entry till *October* 1736.

As the original bill did not extend to this, what they call a supplemental bill, is, to all intents and purposes, to be considered as an original bill; for where a party brings a supplemental bill, and prays a new relief, it must be taken as an original one.

That the court may as well decree a perpetual injunction, as decree the title deeds, which the plaintiffs pray by their supplemental bill, to be delivered up to them.

Mr. *Brown*, of the same side, said, the plaintiff elected to try his title at law, and prays in this court a particular species of relief; the producing a deed in order to enable him to try it *there*, and when this was decreed *here*, they had given him all the relief he asked.

There was nothing pointed out in the bill, but only a defect and impediment to his trying the title at law; for the only thing which was pronounced by the decree, or could be decreed,

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was the producing the deed, and removing the term out of the way.

The deed being in Mr. Justice *Fortescue*'s hands, is no reason why they should have an account of rents and profits here, for after the deed was produced, they might have recovered the rents and profits at law; for they are as much recoverable at law, as the title itself.

In the case of *Bennet* versus *Whitehead*, a person was prevented by fraud from receiving the rents and profits, which gave this court the proper and only jurisdiction, the defendant knowing them in that case to be only leasehold lands, as he had the very deeds in his hands, and yet sets up a right to them as freehold.

There is no pretence of any fraud here, for the plaintiff in his original bill has stated the whole title under the settlement, and therefore nothing was concealed from him, that was necessary for him to know.

Where once a person has made his election to proceed at law, he must take his fate there (1); and though there is a determination in favour of the plaintiff at law, yet a court of equity will not think this is a decisive determination, unless there is an application to the court, expresly to prevent the question from being litigated again, and for a perpetual injunction.

As there is a new ejectment brought, till a trial has been had upon it, it is doubtful, at least, whether the defendant may not recover the right again.

That the supplemental bill is not properly so; for it is a new relief which is prayed

To say, that by praying general relief under the original bill, they are intitled to an account of rents and profits, would be carrying it too far, and attended with bad consequences; for it would be allowing parties to take the advantage of accidents, which have happened after a decree, and which could not possibly be foreseen at the time of bringing the bill.

They cannot, for the plaintiff, shew, that this court will decree account of rents and profits, where there is no trust standing in their way, or any ignorance of their title at law.

[128] The ejectments were brought before the filing of the bill; and if they have been guilty of an error in bringing those ejectments, I do not know that this court sits here to relieve against the blunders of parties in ejectments.

They afterwards brought new ejectments, and recovered upon them; what hinders them then from bringing an action of trespass for the mesne profits? And it may be done with as much ease, and less expence, than an account taken before a Master.

As to the delivery of the deeds, your Lordship will not do it, as it will be laying the defendant under such difficulties as

(1) *Post* 130.

he

he can never get over, and will be equal in every respect to granting a perpetual injunction, and preventing him from ever trying the right again; and submitted, that the court ought to dismiss the bill entirely, as to the account of rents and profits. DORMER v. FORTESCUE.

Mr. *Clerk*, of the same side, cited the case of *Owen contra Aprice*. 1 *Ch. Rep.* 32.

LORD CHANCELLOR,

I am very well satisfied in my opinion upon this case; the general question is, Whether the plaintiff is intitled to an account of the rents and profits, and if he is intitled to them, from what time?

The first divides itself into two considerations:

First, Whether on the foot of his general title the plaintiff has a right to an account of rents and profits from the time of his title's accruing?

Secondly, Whether in this court he has a right to demand them?

As to the first, nothing can be clearer both in law and equity, and from natural justice, than that from the death of his father, the time when his title accrued, he is intitled to the rents and profits.

There was a settlement made in 1662, for a valuable consideration, and the plaintiff claims under the uses of that settlement, by which he takes an estate-tail.

Mr. Justice *Dormer* who died last, was tenant for 99 years, with remainder to his son in tail, which son died in the life of Mr. Justice *Dormer*, and on his death the plaintiff's father was intitled, and after his father died, the plaintiff himself.

From that time he had a right in equity and conscience, and if prevented from coming at it, it must be some impediment in law or equity that hinders him from receiving them. [129]

It has been said, the defendants being in possession under a title, or such a title as they were mistaken in, that if they had taken the proper method they might have made it good; and that Mr. Justice *Dormer* and his son might have barred the estate-tail, either by getting the trustees to preserve contingent remainders to join with them, or by executing a feoffment upon the land, instead of a fine to make a tenant to the *præcipe*.

As to getting the trustees, or the heir to join, to make a tenant to the *præcipe*, that is a very uncertain thing, for I believe trustees to preserve contingent remainders would have been extremely cautious in consenting, as there was no marriage settlement on foot, as a plausible pretence for declaring new uses, different from those under the settlement.

As to the other way, I lay no weight upon that, for it is only saying they might have done it by another method, which the law calls a wrong; such a feoffment as that would have had its effect, and could only operate as a disseisin, and would have gained a freehold by wrong, and that might have made a tenant to the *præcipe* (1); but no presumption of favour arises from

(1) *Contra Taylor ex dem. Atkyns* v. *Horde*, 1 *Burr.* 60. *Vide post.* 141.

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thence, for it is a wrong at least, however it might have substantiated the title at law.

The plaintiff therefore certainly was intitled to the rents, from the accrual of his title.

Under the circumstances of this case the plaintiff has a right to demand an account of the rents and profits in this court.

The next branch of the case is more material, which is, whether the plaintiff has a right to demand an account of the rents and profits in this court; and I am of opinion, under the circumstances of this case, he has a right to come into this court for that purpose.

The Anonymous case in 1 *Vern.* 105. is a note of a case only, and imperfect.

There are several cases where the court will do it, and several to be sure where they will not; but I can by no means admit the latitude in the *Anon.* case in 1 *Vern.* 105. or rather in that note of a case *.

Where an infant brings a bill for the land, and to have an account for the mesne profits, the court may elect him to proceed at law, and retain the bill for the mesne profies.

[*130]

*For if a man brings an ejectment bill for possession, and an account of rents and profits, where there is no mixture of equity (1), the court will oblige the plaintiff to make his election to proceed here, or at law, and if at law he must proceed for the whole there: that case might very possibly be a bill brought by a *prochein amy* for an infant, or attended with some special circumstances omitted by the reporter: if it was the bill of an infant, who has a right to come here, the court might elect him to proceed at law, and retain the bill for the mesne profits.

But as I said before, there are several cases where this court does decree an account of rents and profits, and that from the time the title accrued (2).

Where there is a trust, and a mere equitable title, the plaintiff shall have an account of the rents and profits from the time the title accrued, unless there are special circumstances to restrain it to the bringing of the bill.

As where a man brings his bill in this court, where there is a trust, and upon a mere equitable title, there he shall recover the estate, and the court will give him an account of the rents and profits, and that from the time the title accrued, unless upon special circumstances, and then they will restrain it to the time of bringing the bill (3); as where the defendant had no notice of the plaintiff's title, nor had the deeds and writings in his custody, in which the plaintiff's title appeared, or where the title of the plaintiff appeared by deeds in a stranger's custody.

* Where a man is put to his election, whether to proceed at law or in this court, if the bill be for the land, and to have an account of the mesne profits, he may elect to proceed in an ejectment at law for the possession, and in equity upon the account, because at law he can recover damages for mesne profits from the time only of the entry laid in the declaration. 1 *Vern.* 105.

(1) *Tilley* v. *Bridges*, *Pre. Cha.* 252. *Owen* v. *Aprice*, 1 *Cha. Rep.* 32. *Fonbl. Treatise of Equity*, 13. 1 vol. *Hutton* v. *Simpson*, 2 *Vern.* 724.

(2) See *Drury* v. *Drury*, 1 *Cha. Rep.* 49, and the cases cited in the notes *infra*.

(3) *Dean* v. *Wade*, 1 *Cha. Rep.* 48.

So

So where there hath been any default or laches in the plaintiff, in not asserting his title sooner, but he has lain by, there the court has often thought fit to restrain it to the filing of the bill.

DORMER v. FORTESCUE. The court will restrain it to the filing of the bill, where there has been any default in the plaintiff in not asserting his title sooner.

So in the case of a bill brought by an infant to have possession of the estate, and an account of rents and profits, the court will decree an account from the time of the infant's title accrued, for every person who enters on the estate of an infant, enters as a guardian or bailiff for the infant (1).

Whoever enters on the estate of an infant, enters as guardian or bailiff for the infant.

There are other cases where the court will do it merely upon a legal title, as wherever the plaintiff has been kept out of it by fraud, misrepresentation or concealment of the defendant (2).

So in the case of dower, if a widow is intitled to dower, and her claim is merely upon her legal title, but cannot ascertain the lands out of which she is dowable, this court will assist her to find out the lands, and the court will order her to proceed upon a particular part, and reserve the further consideration till after judgment, and if her title of dower is established, will * give her profits from the time not only of her demanding, which is the time she is to have it in her writ of dower, but will give it her from the time of her title accrued, tho' the statute of the 9 *Hen.* 3. *ch.* 1. gives her damages only from her demand (3).

Where a widow claims dower merely upon a legal title, but cannot ascertain the lands, this court will assist her to find them out, and if her title to it is established, will give her the profits not from the time of the demand only, but from the time her title accrued.

[*131]

I will put this case; suppose a widow intitled to dower of an estate, upon which a term for years was standing out, and she had her title of dower out of the reversion of the term, and she comes into this court to have it removed out of the way, they will decree her an account of the rents and profits from the time of her title accrued, and will set the term as a satisfied one out of the way; but if that term had been out of the way, and she had no need to come into this court, it would have been otherwise (4).

If a dowress comes here to have a term removed, which is a satisfied one, this court will decree her an account of the rents and profits from the time of her title accrued; but if the term had been out of the way, and she had no need to come here, it would have been otherwise.

Then consider how far the present comes up to this case; it appears that the settlement under which the plaintiff's title arose was in the hands of the defendants, and detained by them, tho' I do not say it was fraudulently obtained, but still the plaintiff

(1) So *Bennet* v. *Whitehead*, 2 *P. W.* 645. *Tilley* v. *Bridges*, *Prec. Cha.* 252. 517.

(2) *Duke of Bolton* v. *Deane*, *Prec. Cha.* 516.

(3) In *Curtis* v. *Curtis*, 2 *Bro. Cha. Rep.* 633. The Master of the Rolls observed, "that Lord *Hardwicke*'s words "must have been misconceived by Mr. "*Atkyns*, as to what he has supposed to "have said in respect of the time, from "which the stat. 9 *Hen.* 3. gives the "widow damages."

(4) *Vide Curtis* v. *Curtis*, 2 *Bro. Cha. Rep.* 620. *Delver* v. *Hunter*, *Bunb.* 57.

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could not come at it *without the assistance of this court* (1). The plaintiff, it is true, brought his ejectment before he brought his bill here, and from hence the defendant's counsel have inferred that he knew his title; but how did he know it? why, only by guess, for it is plain that the plaintiff did not so much as know there was this 200 years term standing out, for the deed by which it was created, is not so much as mentioned in the bill, and he only knew it by its being read in the cause.

This is one reason which weighs with me.

The strength of the present case is, that it is a mere equitable title, the legal estate in the 200 years term being in trustees, and appointed to be attendant on the inheritance and for that reason a bar in the plaintiff's way at law.

There is another ground still remaining, and a stronger one, that I think this to all material purposes an equitable title: here is a term created of 200 years by the settlement, the legal estate was in trustees, and the term was appointed likewise to be attendant on the inheritance, so that it was a plain bar in the plaintiff's way at law; and he having then brought his ejectment at random, Lord *Talbot* ordered the bill to be retained for a twelvemonth, that he might, if he pleased, bring a new ejectment.

Besides, if the plaintiff had known any thing of this trust term, he would certainly have made the trustees parties to the suit, that they might convey to him, if he should eventually appear to have the remainder in the inheritance.

But notwithstanding this court has undoubtedly a jurisdiction with regard to decreeing rents and profits, yet if the plaintiff has not taken a proper remedy, or proceeded in a proper method to have an account, he cannot be intitled; and whether he is or not, will depend upon two things:

[132] *First*, As to the nature of the original bill.

Secondly, Upon the supplemental bill.

As to the first, it has been insisted for the defendants, that it is brought for another purpose, *diverso intuitu*, and is confined merely to the discovery of the settlement, and for producing the deed on the trial at law.

If there is not such a case made by the bill as will intitle the plaintiff to an account of rents and profits, praying general relief will not intitle him to it.

To be sure, if the plaintiff has not made such a case by his bill as will intitle him to an account of rents and profits, it is rightly said, that his praying general relief will not intitle him; though Mr. *Dobbins*, a counsel formerly in this court, used to say, that *praying general relief*, was the next best prayer to the Lord's prayer (2).

(1) The plaintiff by his supplemental bill prayed (besides the account of rents and profits), "that the said deed of settlement, and the duplicates thereof, *and all other deeds and writings*, which concern the said premises, may be delivered to him." *Reg. Lib. A.* 1743. fol. 344. *Vide Townsend* v. *Ash*, *post*. 340.

(2) *Cook* v. *Martyn*, *ante* 2 vol. 3.

The

The bill then, no doubt, is inartificially and defectively drawn, for want of so full a charge as might have been laid of the possession in the defendant: but then the plaintiff has charged that he has brought ejectments against the defendants for this estate, which is tantamount to charging possession. And the defendant, Mr. Justice *Fortescue*, actually by his answer admits himself in possession.

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The plaintiff's charging that he has brought ejectments against the defendant for the estate, is tantamount to charging possession in the defendant.

Where the defendant's counsel would confine the general relief, prayed by the original bill, to the producing the deed at the trial, they are mistaken in the nature of the bill, for the bill desires not only that the deed may be produced at the trial, but delivered up for the benefit of the plaintiff; and what puts it out of all doubt, is, that here is likewise an affidavit annexed of the want of the deed, which makes it a very strong case for the plaintiff, because the annexing an affidavit is, where the plaintiff has an intention to change the jurisdiction from a court of law to a court of equity; and if the bill was merely for a discovery of a deed, or for producing it at law, no affidavit is necessary; and this is the constant distinction.

Where a bill is merely for a discovery of a deed or for producing it at law, no affidavit is necessary; otherwise where the plaintiff wants to change the jurisdiction from a court of law to a court of equity (1).

And as this appears to be the nature of the bill; so I think my Lord *Talbot* understood it in this light; and if the trustees had been parties to it, the court might have decreed possession, and a conveyance of the trust estate, if they thought it a clear point for the plaintiff, or might do as Lord *Talbot* has done, direct a trial at law when it is doubtful.

Had the trustees been parties to this bill, the court might have decreed possession and a conveyance of the trust estate, if the point had been clear with the plaintiff.

Here his Lordship has likewise decreed the deed to be produced at the trial at law, and that the term for 200 years should not stand in the way, and reserved all further considerations.

It is all one as to the jurisdiction of the court, whether they make use of one mode of expression in drawing up their decrees, or another, or whether they direct the parties to proceed in the ejectment, or a trial at law: but if the very trustees of this term had been before the court, I would not have directed an assignment of this trust, till the point in relation to the title had been first determined. [133]

I am of opinion that the original bill extends to every thing which is now insisted on by the plaintiff, and that I ought not to confine it to the single matter of producing the deeds at the trial; and that in the first place, the court under this will may very properly give directions as to the disposition of the title deeds.

But suppose the original bill to be as defective as the defendant's counsel would have it, could any thing be more proper than to bring a supplemental bill, to put this matter in issue, and to supply the defects of any in the original bill.

(1) *Anon. ante* 17.

Sup-

Dormer v. Fortescue.

Where full directions have not been given a supplemental bill may be brought in aid of a decree of this court.

Supplemental bills are often brought even in aid of a decree of this court, as in a decree to account for want of full direction before; and directions are given under the supplemental bill that the new matter should be connected with the former decree.

The supplemental and the original ought to be considered as one bill, and connected together.

If the plaintiff's original bill had not prayed this general relief, it was very proper to bring a supplemental bill that he may have an entire relief; and I think that they ought to be considered as one bill, and connected together.

All the cases which are material have been cited, the first case was that of *Coventry* and *Hall* (1), or *Hill*, which was only a questionable title where a recovery could not be had at law.

The *Duke of Bolton* v. *Deane*, a mere legal title, and was a strong case for leaving it to law, and yet an account of rents and profits was decreed in this court.

The case of the *Duke of Bolton* versus *Deane*, is merely a title at law, and therefore applicable to the present point, for I do not know that the Duke of *Bolton* could be said to be out of possession; for where the tenant held over after his term expired, he was by sufferance only, and therefore his possession was the Duke of *Bolton*'s possession (2); this was as strong a case to leave it to law as could be, and yet the court decreed under that bill an account of rents and profits.

Bennet versus *Whitehead* (3), is a much stronger case, and more similar to the present; I was of counsel in it myself, and as it is in the book and also upon memory, it was a mere legal title, and there the deeds were in the custody of the plaintiff himself, here in the defendant's hands, and therefore this is a stronger case.

[134] Still it is objected that where a man is *bonæ fidei possessor*, he shall not account according to the rule of the civil law; and the rule of this court, and the civil law, is stronger in this respect than the law of *England*.

To be a *bonæ fidei possessor* is, where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title.

But where a man shall be said to be *bonæ fidei possessor*, is, where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title: which could not be here, for Mr. Justice *Fortescue* had all the deeds, and the very settlement itself on which the title depended.

Another objection has been made, that though the plaintiff has obtained a verdict at law, this is not a final determination of the parties' right, and therefore the court ought not to decree an account of rents and profits, because a new ejectment is now depending, and the defendants may possibly recover the estate back again.

This would narrow the jurisdiction of the court too much.

There are instances where upon a mere legal title the court have decreed an account of rents and profits, as in the case of an infant who brings a bill for possession, and for an account of

(1) 2 *Cha. Rep.* 259. S. C.

(2) *Har. Co. Litt.* 330. b. note 1. *Cowp.* 703.

(3) 2 *P. W.* 644. S. C.

rents

rents and profits, and yet they do not decree a perpetual injunction, though they decree an account of rents, &c. DORMER v. FORTESCUE.

Suppose an heir at law brings a bill for discovery of deeds and writings, and for the mesne profits, and the court decree him the deed, &c. yet if the defendant should afterwards at law make out out a better right than he did here, this court would not disturb him in it, but assist him in recovering the deeds back again.

Though on a bill of discovery the court decree the deeds and mesne profits to an heir at law, yet if the defendant afterwards at law should make out a better right, this court would assist him in recovering back the deeds again.

If I was to delay decreeing the account of rents and profits now, it would be attended with infinite inconvenience, and therefore I am of opinion that the plaintiff is intitled to an account of the rents and profits from the time of the plaintiff's title accruing, which is from the death of his father in 1729.

And as to the deeds and writings let them be brought before the Master, upon oath, and as to the disposition of them, I shall reserve the consideration of that till the final right to the inheritance is determined.

The opinion of the Judges in the House of Lords, in the case of *Dormer* against *Fortescue*, as delivered by Lord Chief Justice *Willes*, I apprehend will not be unacceptable, and therefore venture to give it to the publick, and hope in such a manner as not to do any injury to the memory of that very learned and able Judge.

Smith on the Demise of Dormer against *Packhurst et al'* *the 23d of February* 1741-2, *on a Writ of Error in the House of Lords, from the Judgment in B. R. Mich.* 14 *Geo.* 2. [135] Case 48.

LORD Chief Justice *Willes*; In pursuance of your Lordships' order, I and my brethren have met to consider of the questions proposed, and are unanimous in our opinions; but as it is a point of great consequence and nicety, your Lordships will excuse me if I take some time in stating the case, and the reason of our opinion; which I shall do in as clear and intelligible a manner as I can: Mr. *John Dormer* in the year 1662, upon the marriage of his eldest son *John Dormer*, made a settlement of his estate with several limitations; and as the questions in the cause arose upon the words of the settlement which are agreed on both sides, I shall repeat them: "After limiting an estate "to his son *John Dormer* and the heirs of his body, he limits "his estate as follows; and in default of such issue, to the use "and behoof of *Robert Dormer*, one of the brothers of the said "*John Dormer*, for the term of 99 years, if he shall happen "so long to live; and from and after the death of the said

S. C. 2 Stra. 1105. Andr. 315. 18 Vin. 413. pl. 8.

All the judges were unanimously of opinion, that the fine and recovery suffered by *Robert Dormer* and his son when he came of age were no bar, for a good estate being vested in the trustees during the life of *Robert Dormer*, he and his son could not by any act defeat the remainder-men without the consent and joining of the trustees during the life of *Robert Dormer*, as the freehold was in them.

"*Robert*

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"*Robert Dormer*, or other sooner determination of the estate "limited to him for 99 years, to the use and behoof of *T. S.* "and *J. R.* and their heirs during the life of the said *Robert* "*Dormer*, upon trust to preserve the contingent uses and estates "herein after limited from being defeated and destroyed, and "for that purpose to make entries and bring actions, as the "case shall require; but to permit the said *Robert Dormer* "and his assigns to receive the rents and profits of the said "estate during the term of his life, and after the end or other "sooner determination of the said term, to the use and behoof "of the first and every other son of the said *Robert Dormer* in "tail male, with remainder in the same words to *Fleetwood*, "another brother of the said *John Dormer*, remainder to *Peter* "another brother, and the last remainder to *Eusebe* the father "of the lessor of the plaintiff for 99 years, if he so long live, "remainder to the trustees in the like manner as in the limi-"tation to *Robert Dormer*, and to the first and every other son "of *Eusebe Dormer* in tail male." *Robert Dormer* had one son *Fleetwood*, and when he came of age *Robert* and his son *Fleetwood* levied a fine to make a tenant to the *præcipe*, and suffered a recovery, in which *Fleetwood* was vouched; the son died without issue, then *Robert Dormer* died, leaving no other son, but four daughters. *Fleetwood* and *Peter* are both dead without issue, and *Eusebe* being dead, his son, the lessor of the plaintiff, and the nearest surviving remainder man, made his actual entry within five years, and being so seised demised to the plaintiff, &c.

[136] The two questions proposed by your Lordships were first, whether the remainders limited to the first and every other son of *Eusebe* were good remainders in their first creation; and secondly, whether the fine and recovery suffered by *Robert Dormer* and his son barred these remainders.

Such a construction ought to be made of deeds, *Ut res magis valeat quam pereat.*

Before I proceed to the questions, I shall lay down some general rules and maxims of the law, with respect to the construction of deeds; first it is a maxim, that such a construction ought to be made of deeds, *ut res magis valeat quam pereat*, that the end and design of the deeds should take effect rather than the contrary.

Words are not the principal things in a deed, but the intent of *the grantor*, and though the judges have no power to alter them or insert others, yet they ought to construe them the most agreeable to his meaning, and reject any that are insensible,

Another maxim is, that such a construction should be made of the words in a deed, as is most agreeable to the intention of the grantor, the words are not the principal things in a deed, but the intent and design of the grantor; we have no power indeed to alter the words or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible: these maxims my Lords are founded upon the greatest authority, *Coke*, *Plowden*, and Lord Chief Justice *Hale*, and the law commends the astutia, the cunning of Judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may shew the ingenuity of counsel, but is very ill becoming a Judge.

Having

Having laid down these maxims, I shall proceed: in this case the intention of the party cannot be doubted, the grantor manifestly intended to continue the estate in his name and blood as far as he could by the rules of law, the law will not admit a perpetuity, but the intention of the party so far as is consistent with the rules of law ought to be observed.

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Though the law will not admit a perpetuity, yet the intention of the party, so far as is consistent with its rules ought to be observed.

In this case it was said that the intention of the party by appointing trustees to preserve the contingent remainders, was only to preserve the estate till there were issue of *Robert Dormer*, and that they were not meant to preserve the distant remainders; but if this had been the case how came *Robert Dormer* not to be made tenant for life, for even though he had been tenant for life, the trustees could have preserved the remainders till his son came of age; but the plain intent of making him tenant for 99 years only, was to prevent him and his son from barring the estates in remainder without the joining of the trustees, the effect of which is, that it could not be barred without the consent of the trustees during the life of *Robert Dormer*, which is going as far as the law will permit.

The plain intent of making *Robert Dormer* tenant for 99 years only, was to prevent him and his son from barring the estates in remainder without the joining of the trustees.

The objections to the limitations to the first and other sons of *Eusebe*, &c. were these; first, that the commencement of the estate to the trustees and to the first son was at the same time, [137] and consequently the latter limitation was void. Secondly, That the limitations were inconsistent, and therefore void; and thirdly, that where there is an estate limited upon two disjunctives, which cannot stand together (because if one happens the other cannot) that in such case it shall take effect upon neither, but the settlement shall rather be construed to be void.

As to the first we are clearly of opinion, that the limitation of the estate to the trustees and to the first son, &c. commenced at different times; in support of the first objection it was said that an estate limited during the life of another to commence at his death, is void; this is certain, but when the deed goes on and says, or other sooner determination of the term for years, this manifestly fixes a commencement of the estate to the trustees, at the determination of the term, which might happen not only by effluxion of time, but may take effect by surrender, or forfeiture, several ways, in the life-time of *Robert Dormer* or *Eusebe*: and we are of opinion, that the estate of the trustees might so commence; but the estate to the first son, &c. could not commence till the death of their respective fathers.

It is said by my Lord *Coke*, that the word term, though it is more properly applied to a term for years, yet may mean an estate for life, and it is plainly in this deed used in that sense: the trustees are to permit *Robert Dormer*, &c. to receive the profits during the term of his life; and the estate to the children is not to commence till the end, or other sooner determination of the said term, which, by referring the relative to the last antecedent, must mean the term of his life; as to the words

The word term, though more properly applied to a term for years, yet may mean an estate for life.

SMITH v. PACKHURST. *sooner determination*, inserted after the estate for life, these are insensible, and may be rejected; they were probably thrown in *currente calamo*, or by following a precedent, and if the precedent was before the reformation when there was a civil death, as well as a natural, by entering into religion, it might then have a meaning.

As to the second point, since we are of opinion that there was a different commencement of the estates limited to the trustees, and the issue in tail, there is no inconsistency.

As to the third, it is highly absurd, and against reason, and I think against law too: but in support of this, the case of *Camberford* and *Birch*, 2 *Lev.* 157. was cited by the defendant's counsel; there the settlement was with a proviso, that in case none of the brothers or sisters of *A.* or any of the children be living, then immediately, or after a term of 21 years ended, to the use of *B. C.* and *D.* his brothers, successively in tail male, remainder to the plaintiff: *A.* died without issue, *B.* and *C.* died without issue male, but *B.* had issue a daughter; and *A.*
[138] himself had sisters living; this the court held to be one sentence, and a condition precedent; that none of the brothers or sisters of *A.* or any of their children be then living, and which, as it had not happened, all the remainders were void, and judgment for the defendants; and it was not at all determined on the necessity there was, that the remainders should take effect on both disjunctives; but that case does not come up to the present, for it was never intended that the remainder should vest on the death of *Robert Dormer*, but as appears by the express words on a determination of the estate *for 99 years* before his death, and such a construction as the defendant's counsel contended for, would destroy not only the remainder to *Eusebe*, but every one of the remainders limited by the deed, except the remainder to *John Dormer* and his heirs; and the words of a deed must be extremely strong, which would induce us to construe all the limitations in the deed to be void: we therefore are of opinion, that the limitations to the first and every other son of *Eusebe*, were good remainders.

As to the second principal question, Whether the limitations to the first and other sons of *Eusebe*, were well barred by the fine and recovery, without the joining of the trustees? It was insisted upon, to shew they were barred, *first*, that no estate at all vested in the trustees: *secondly*, if any estate vested, it was a contingent estate, or a right of entry only; and, *thirdly*, that whatever estate it was, it was effectually barred by the fine and recovery.

As to the first, we are of opinion, that an estate commenced in the trustees immediately after the determination of the term for years, by effluxion of time, forfeiture, or otherwise.

As to the second, whether the estate to the trustees was a vested or contingent estate, appeared to us the great difficulty

That a remainder is contingent, when uncertain, whether it would take effect or not, is by no means the true legal definition of it; for if an estate be limited to *A.* for life, remainder to *B.* and the heirs of his body, this is a vested remainder, notwithstanding *B.* may die without heirs of his body, before the death of *A* and the remainder never take effect in possession.

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in the case; the doctrine of contingent remainders is very nice and intricate, and if we were to cite all the cases in the books, I fear we should rather puzzle than explain the difficulty: the definition of a contingent remainder, laid down by the counsel for the plaintiff, that a remainder was contingent when it was uncertain whether it would take effect or not, is, by no means, the legal notion of a contingent remainder; it is not the uncertainty of taking effect in possession that makes it contingent; if an estate is limited to *A.* for life, remainder to *B.* and the heirs of his body, every one will allow that this is a vested remainder; and yet, it must be allowed, that it is uncertain, whether *B.* may not die without heirs of his body before the death of *A.* and consequently the remainder may never take effect in possession.

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All contingent remainders may be reduced to two heads; *first*, where a remainder is limited to a person not in being, and who may never exist; *secondly*, where a remainder depends upon a contingency collateral to the continuance of the particular estate.

We have considered this point a good deal, and are of opinion, that all contingent remainders may be reduced to these two heads (1); *first*, where a remainder is limited to a person not in being, and who may possibly never exist; and *secondly*, where a remainder depends upon a contingency collateral to the continuance of the particular estate: I will give an instance of each: If an estate is limited to *A.* for life, the remainder to first his son before he has any child; this is a contingent remainder of the first kind, for it is uncertain whether he will have any son: If an estate is limited to *A.* for life, and after the death of *J. S.* to *B.* in fee, or after *J. S.* shall come from *Rome*; this is a contingent remainder of the second kind; for it is uncertain what time *J. S.* shall die, or shall come from *Rome*: for as the law, for many good reasons, will not permit the freehold to be in abeyance, it expects the contingent remainder to take place when the particular estate determines, and it cannot immediately vest in those cases, when it is uncertain whether the contingency will happen.

The present case comes under neither of these heads, the trustees are in being, and capable of taking: the estate does not depend upon any contingency collateral to the continuance of the particular estate; we, therefore, are of opinion, that, subject to the term of 99 years, a good estate of freehold vested in the trustees during the life of *Robert Dormer* (2). I will put one case; supposing a person grants an estate to *A.* for 99 years, if *A.* should so long live, and after the death of *A.* to another; supposing *A.* should outlive the term, or commit a forfeiture, is not the freehold vested in the grantor during the life of *A.* and has not he a power to enter, and if he has an estate in this case, may he not grant it away upon the same terms, and would not his grantee have the same estate? But consider what would be the consequence, if the trustees do not take but upon a contingency, their heirs cannot take;

(1) See Mr. *Fearne's* division of Contingent Remainders, *Essay on Contingent Remainders*, page 3. to 11.

(2) *Duncomb* v. *Duncomb*, 3 *Lev.* 437. *Fearne*, 151, to 157.

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and if the trustees die before the contingency happen, the limitation to their heirs fails; and if the estate limited here to the trustees is contingent, so are the limitations to trustees in all settlements, and consequently all the settlements for these 200 years, ever since the statute of uses, may be questioned: But can we conceive, my Lords, that every one has been mistaken for these 200 years, and that this new light is just now arisen to us? Surely it is a much less evil to make a construction, even contrary to the common rules of law, (though I think this is not so), than to overthrow, I may say 100,000 settlements; for it is a maxim in law, as well as reason, *communis error facit jus*.

A right of entry always supposes an estate; for a right of entry is nothing without a right to hold and receive the profits; and if an estate be granted to a man, reserving rent, and in default of payment, a right of entry to be granted a stranger, it is void.

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As to the right of entry, I should scarce have thought it deserved an answer, but that some weight has been laid upon *it; we are of opinion, that a right of entry always supposes an estate; for what is a right of entry, without a right to hold and receive the profits; therefore, I have always thought, that if an estate is granted to a man reserving rent, and in default of payment, a right of entry was granted to a stranger, it was void (1): a case was cited to endeavour to shew, that a right of entry might subsist without an estate; but I am inclined to think some material circumstances in that case are omitted, and are agreed in our judgment, that the law is otherwise; and for these reasons are of opinion, that not a mere right of entry, nor a contingent estate, but an estate of freehold, was vested in the trustees during the life of *Robert Dormer*.

The last point to be considered, is, what will be the effect of the fine and recovery.

A feoffment differs materially from a fine, for the feoffment is made openly upon the land, and the feoffee immediately put into possession, but a fine has nothing publick except the proclamations, and therefore by 4 *Hen.* 7 c. 24. *non-claim* runs only from the proclamations. A feoffment can only be of land, a fine may be of rents, and other incorporeal inheritances.

As to the fine, it hath been insisted, that it is a feoffment upon record, and that a fine even by tenant for years is not void; as to this fine, it must be considered either as a fine of lessee for years, or as a fine of a reversioner in tail; fines of lessee for years, I confess, are not absolutely void, but operate by way of estoppel, and therefore bar the parties claiming under them; a reversioner may levy a fine, for this reason, and it bars the issue in tail, but it can never be conceived that the fine of a reversioner can get the freehold; let us therefore consider it as the fine of a lessee for years; it has been said, that lessee for years, in this case, might have barred all remainders by a feoffment; that a fine *sur done grant* and render supposes a gift, which means a feoffment, and therefore is equivalent to a feoffment: I am of opinion that even a feoffment would not have been a bar unless the trustees had been asleep, for they might have immediately entered, and possessed the estate, if they had lain by till the recovery had been perfected, that might have been a bar, but that is not to be supposed. It has been said, that a fine supposes a feoffment; but the word *done*, though it sometimes signifies a feoffment, has many other significations; it may signify grants of incorporeal inheritances, which will not pass by feoffment, and therefore

(1) So *Litt.* *f* 347.

does

does not necessarily suppose a feoffment: a feoffment differs very materially from a fine, for in notoriety of fact, the feoffment is supposed to be made openly upon the land, and the feoffee is immediately put into the possession, but a fine has nothing publick except the proclamations; and therefore by the act of parliament of 4 *Hen.* 7. non-claim runs only from the proclamations; whereas, if a fine supposes a feoffment, it will have its effect from the time of acknowledging, which is a private transaction; a feoffment can only lie of land, a fine may be of tithes, and other incorporeal inheritances (1).

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Great weight has been laid upon Lord *Coke*'s authority, who says a fine is a feoffment upon reccord (2); he was certainly a great man, which has made some people think every thing he says is right, though he has his mistakes; but; in answer to it, I shall offer two or three great authorities, and one of equal age and authority with Lord *Coke*: in the cases that were cited at the bar, it was determined by Lord Chief Justice *Holt* and Lord *Macclesfield*, that a fine was a feoffment upon record, when the party had such an estate as will intitle him to levy a fine, that is an estate of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and operates as an estoppel only, and bars none but the party claiming under it.

A fine is not a feoffment upon record, unless the party has such an estate as will intitle him to levy a fine, that is an estates of freehold; otherwise a fine has no effect whatsoever with respect to a stranger, and bars none but the party claiming under it.

As to the authority I promised, which was equal to the authority of Lord *Coke*, it is Lord *Coke* himself, who in the page before that of the case cited *Co. Lit.* 9. *a.* has these expressions, a feoffment is the most ancient and sure way of conveyance, both for that it is solemn and publick, and therefore best proved, and also for that it cleareth all disseisins, &c. which cannot be done even by fine and recovery; so that it is Lord *Coke*'s own opinion, that a feoffment can effect that which a fine and recovery cannot, and therefore it cannot longer be maintained, that he has laid it down, a fine is to all purposes a feoffment upon record.

A feoffment is the most ancient and sure way of conveyance, both as it is publick, and therefore best proved, and also as it clears all disseisins, &c. (3) which cannot be done even by fine and recovery (4).

It was said that if a fine was void in this case, how would it make a forfeiture; there are sure many cases where an act may be void as against another, and yet be a forfeiture to the person; I will give one instance, that of a copyhold tenant, a lease made by him is certainly void against the lord, and yet is a forfeiture. Upon the whole we are of opinion that the fine and recovery were no bar to the remainders.

Many cases where an act may be void against another, and yet a forfeiture to the person; as a lease for instance made by a copyhold tenant, is certainly void against the lord, and yet is a forfeiture as to himself.

(1) *Cruise on Fines*, 121.

(2) *Co. Litt.* 50. *a.* 2 *Black. Com.* 348.

(3) *Ante* 129. *Towsend* v. *Ash*, *post*, 339. *Shields* v. *Atkyns post* 562. With respect to the particular operation of a feoffment in creating a disseisin, the reader is referred to *Har. Co. Lit.* 330. *b* note 1. and to the essay on Uses and Trusts, 305. to 324.

(4) *Brereton* v. *Gamul*, *ante* 2 vol. 240. *Carter* v. *Barnardiston*, 1 *P. W.* 520.

Case 49. *Addlington* versus *Cann and Andrews*, *July* 3, 1744.

There must be a will duly executed to create a charitable use, and the court will not set up a trust for a charity without a declaration in writing: for in this case Lord *Hardwicke* held that charitable uses are within both the clauses of the statute of frauds and perjuries, as well within the clause of devises, as the clause relating to the declaration of trusts; and notwithstanding there were circumstances which shewed the inclination of the testator here, that some part of his estate should go to charitable uses, yet he did not think the evidence arising from thence certain enough to decree this to be a trust for charity, and that admitting parol evidence to prove it would be breaking in upon the statute.

LAWRENCE *Hollister*, being seised of several messuages, lands and tenements in *Bristol* and other places, "did "by will, dated the 16th of *March*, 1725, devise all his mes-"suages, &c. in *Bristol* to a company of merchants there, in "*trust to dispose of the rents, &c. not exceeding 350*l.* for "the building of an hospital to be called *St. Lawrence's Hos-"pital*, and to be under a master for instructing in reading, "writing, arithmetick, and mariner's art, as many boys as "the profits of the estate given by him to the use of the "hospital would cloath; and it was his desire that the de-"fendant and other persons named in the will should deter-"mine all matters in difference relating to the hospital, and "after their deaths the dean and chapter of *Bristol*, and their "successors for ever, should be the inspectors of the hospital, "and appointed the defendants *Cann*, *Andrews*, and four other "persons, executors."

[*142] Mr. *Hollister* being in some apprehensions whether this was a good disposition to a charity, and being apprehensive that it was void under the statute of mortmain, 9 *Geo.* 2. *ch.* 36.

On the first of *August*, 1738, he made a second will, "re-"citing that the defendant *Cann* had been for many years "concerned for him in the way of his profession in various "affairs, and had discharged them with great integrity and "to his intire satisfaction; and reciting also that his cousin "the defendant Mrs. *Andrews* had for about twenty years "served him as his house-keeper with great fidelity, he de-"vised to the defendants and their heirs all his messuages, "&c. in *Bristol* to hold to the defendants, their heirs and "assigns for ever, in the nature of joint-tenants, and likewise "gives several other estates in different counties to these two "defendants in joint-tenancy, and gave to the plaintiff (who "is his only child and heir at law) twenty guineas to buy "her mourning, and strictly enjoins her to submit to the "disposition he had thereby made of his estate (she being "handsomely provided for by his marriage-settlement on "her mother, and otherwise since), and that she should not "presume to contest the same; it being made and published "by him on the most cool and mature deliberation; all his "leasehold estates and personal estate, not before disposed of, "he gave to the defendants, their executors, administrators "and assigns, and appointed them executor and executrix, re-"voking all other wills."

On

On the 11th of *August* following the testator died, and some time after his death, the defendants admit they found in his closet a paper writing subscribed by him, and is as follows: ADLINGTON v. CANN.

"Rules, requests, that are desired to be observed and followed, touching the execution of a certain will made by "*Lawrence Hollister*, dated the 2d day of *August* 1738, the "administration and power is wholly left to the management "of the worthy Mr. *Cann* and *Mary Andrews*, their heirs and "assigns for ever in the nature of jointenants. It was never "my thoughts, that my worthy friend *William Cann*, Esq; "should have any trouble in this affair, more than to assist "my cousin *Mary Andrews*, in managing the same, and "I hope that through *his great goodness and charitable disposition* [143] "he will be pleased to bring the whole affair to it's desired "issue: and because I am not willing to incumber the said "worthy *William Cann*, Esq; I have wrote a full particular "account of all matters that are to be transacted under the "administration of my said will, in the directions that are "separately given to the said *Mary Andrews*, which I hope "and doubt not but the said worthy *William Cann*, Esq; "will, according to his undoubted generosity and integrity, "see performed, according to the humble request of a true and "real friend, and according to your wonted and well disposed "charitable disposition towards all men. *Law. Hollister. Dundry, August* 9, 1738."

This paper was written by one *William Long*, and subscribed by the testator.

Mary Adlington, only daughter and heir of the testator, filed her bill against Mr. *Cann* and Mrs. *Andrews* the 25th of *May*, 1739, and prayed a discovery of the trust, and of what they know to have been said or wrote by *Lawrence Hollister*, or his order, touching the application of his real and personal estate, and that the will of the 1st of *August* may be declared null and void, and that she may be let into possession of the real estate, and that they may account to her likewise for the personal estate of her father.

The defendants to so much of the bill as seeks a discovery of any secret trust for charitable uses, or any parol, or other declaration of trust of the real and personal estates of *Lawrence Hollister*, not made by him in writing, and not signed by him, they plead that he was seised in fee of those lands, and that by the will of the 1st of *August*, 1738, he disposed of them absolutely to them and their heirs.

And further plead the act of 29 *Ch.* 2. *ch.* 3. for prevention of frauds and perjuries, *by which all declarations or creations of trust of any lands should be manifested by some writing signed by the party, or by his last will, or else should be utterly void and of none effect.* And therefore the discovery of such parol declarations of trust, as sought by the bill, is no ways material to the plain-

ARLINGTON v. CANN. tiff's relief, nor are defendants obliged to answer to it, and therefore plead the will and act in bar.

In answer to the residue of the bill, the defendant *Andrews* positively denies that such directions as are alluded to by the said writing, or any other directions, were ever given by the said testator to her, touching any charitable use, or trust in the bill mentioned, or any other trust whatsoever.

[144] They both likewise deny that they were ever named or appointed, in any writing to their knowledge, to have the management of any charitable use as trustees: or that the testator did signify to them in any kind of writing his designing to settle his estate in trust for the benefit of any charitable use or uses.

On the 28th of *July*, 1740, the plea came on to be argued before Lord *Hardwicke*, who ordered it to stand for an answer, with liberty to except, and the benefit of the plea was saved to the defendants till the hearing of the cause.

This cause stood in the paper the 5th of *June*, and was heard soon after.

Mr. Attorney-General for the plaintiff.

That though the testator has taken all the care he can to evade the statute of mortmain, yet the statute will not permit an act to avoid it.

That *clausulæ inconsuetæ induount suspicionem*, and that the introduction of the will, and giving the estate to the defendants in joint-tenancy, are very extraordinary

That the act does not require, that the devise of land upon a trust should be such a one as is capable of being carried into execution.

That the paper is to be taken as part of his will, that this is a trust, and appears to be so by proof and admission; and clear that it is a declaration of trust, though it does not appear for what purposes.

That the law being for a general good, ought to be liberally expounded.

By the stat. of *Mortmain*, 9 *G.* 2. *ch.* 36. "No manor, "lands, &c. nor sums of money, goods, &c. or any other personal estate whatsoever to be laid out in the purchase of any "lands, &c. shall be given, granted, &c. or any ways charged "or incumbred by any person or persons whatsoever, *in trust* "*or for the benefit* of any charitable uses whatsoever, unless such "gift, coveyance, appointment, &c. be by deed indented, "sealed and delivered in the presence of two or more credible "witnesses, twelve kalendar months at least before the death "of such donor or grantor (including the days of the execution and death) and be inrolled in the court of Chancery "within six kalendar months next after the execution thereof, &c."

That under the words, *in trust for or the benefit of*, they might be admitted to read parol proof, to shew it to be a trust for a charity.

Mr. *Wilbraham* for the defendants. ADLINGTON v. CANN.

The teſtator had a power to give the eſtate as he thought proper, ſo as his diſpoſition was conſiſtent with the rules of law, as well with regard to the manner of giving, as the object of the gift.

If the gift be to the deviſees for their own benefit, in point of law it is a good deviſe.

Upon the face of the will it appears to be ſo, and *primâ facie* in every deviſe, not only the legal, but the beneficial intereſt paſſes.

To deprive a deviſee of this benefit, it is incumbent on the plaintiff to ſhew that it was given upon a truſt, or that the will is inconſiſtent with the rule of ſome poſitive law, and that the deviſee took the legal intereſt in ſuch eſtate, not for his own but for the uſe of another.

This muſt be done by ſhewing it to be a truſt, and that cannot be done but by ſhewing a declaration of that truſt in writing; and therefore the plaintiff has recourſe to the paper writing; and this is ſaid to be a declaration of the truſt of the legal eſtates given by the will.

If this were a voluntary deed, would a paper even declaring a truſt be ſufficient to take it from the grantee? no certainly.

If an eſtate is given by a will, can a paper-writing declare that the truſt of the lands ſhall be to *A.* remainder to *B.* and take it clearly from the deviſee, and give it to another?

This would evade the intent of the ſtatute of frauds and perjuries (1), which was to prevent frauds in obtaining wills from perſons by obtending other inſtruments, or by forgery.

Here if a man was conſcious that another had left his eſtate to one or two perſons, if a third ſhould get a declaration that the deviſees were truſtees for himſelf, or if ſuch a paper ſhould be forged; this would take away the deviſed lands from the deviſee, who had them by a ſolemn inſtrument, and tranſlate the gift to another, without any other ſolemnity but a paper writing barely ſigned, but not atteſted.

The queſtion is, Whether here is ſuch a declaration of a truſt in writing as the court can make any decree upon, to wreſt the legal eſtate out of theſe deviſees for the benefit of a third perſon. And the reſolution of this queſtion will depend on another.

Whether here are grounds ſufficient for a court of equity to have declared the defendants truſtees for a charity; for I will not contend but that if they were truſtees for a charity, though an indefinite one, that might be ſufficient to enable the crown to apply the gift. [146]

This paper is not ſufficient to determine upon, that the teſtator meant to give his eſtate at all in charity.

(1) *Vide poſt* 151.

ADLINGTON v. CANN. That it is too uncertain to found a judgment upon, and but conjectural at least.

Whether he meant this will is not clear, for the date is different, the paper referring to a will of the 2d of *August*: nor does it with certainty answer the description, for the defendants are not joint-tenants of the whole, part of the estate being given to Mr. *Cann* solely.

It appears likewise by these deeds that the testator had a regard for Mrs. *Andrews*, and a design to provide for her.

Lord Chancellor thinking there might be some resemblance between this case and those upon the statutes of superstitious uses, where *non constat* that there was any such use on the face of the wills themselves, but a secret trust for that purpose, ordered this cause to stand over to search into precedents. And on the 3d of *July* 1744, the cause came on again, when the counsel for the plaintiff produced three precedents out of the court of exchequer.

First, The *Attorney-General* against *Jones*, the 4th of *James* the Second.

Secondly, The *King* versus *Lady Portington*, the 4th of *William* and *Mary*, 1 *Salk*. 162. and *Cases in B. R. in the time of William the Third*, *Cas*. 31.

Thirdly, The *Attorney-General* against *Lawson*, *Trinity* term *the third of William and Mary*.

To shew that notwithstanding there is not under a will an express devise to a superstitious use, yet that a court of equity will from suspicious circumstances, as where a testator devises his estate to a stranger and his heirs without declaring a trust, admit parol evidence to shew the testator's intention to give it to such a use.

The counsel for the defendants insisted that two out of the three cases did not come up to the present, for they were not the case of wills, but upon a conveyance.

[147] The last has some resemblance, because it was upon a will, a devise to Lady *Portington* and her heirs, without any trust; the court declared it to be a superstitious use, and therefore the King shall order it to be applied to a proper use.

So far as this decree was founded upon parol evidence, it differs from the statute of frauds and perjuries.

But it is material what grounds they went upon in admitting such proof.

It is stated in Mr. Serjeant *Salkeld's Reports*, "that it was "held first, that the statute of frauds did not bind the King "but took place only between party and party. Secondly, "That the King, as head of the commonwealth, is obliged "by the common law, and for that purpose intrusted and em- "powered, to see that nothing be done to the disherison of the "crown, or the propagation of a false religion, and to that "end intitled to pray a discovery of a superstitious use. Third- "ly, This use being superstitious, is merely void, and for "that reason the King cannot have it: yet however it is not

"so

"so far void as that it shall result to the heir, and therefore "the King shall order it to be applied to a proper use;" so that the ground upon which the decree goes upon there, is the prerogative given to the King by the first of *Edward* 6th, *ch.* 14. ADLINGTON v. CANN.

There are three cases where a statute shall bind the King, though he is not named.

First, He is included in the 13th of *Elizabeth* for restraining college leases *under the general words body politick or corporate.*

Secondly, he shall not be exempted by construction of law out of the general words of acts made to suppress wrong.

Thirdly, The general words of statutes which tend to perform the will of a founder or donor shall bind the King though not named. See *Magdalen Coll. case*, 11 *Co.* 66. *b.*

The reason why a benefit is given to the King where there are superstitious uses, is to prevent the growth and encouragement of a false religion. *Vide* 1 *Ed* 6.

From this time down to the statute of frauds, the King might have had the benefit of parol evidence; but as the King is not bound by the *Stat.* of frauds and perjuries, for he is not named, and relating only to party and party, the reason of the court of exchequer's admitting parol evidence was founded upon this rule.

The present question is between an heir at law and a devisee; [148] and there is no prerogative in this case, neither is there any particular privilege belonging to a charity, to exempt it out of the statute of frauds.

That the statute of mortmain does not vest any thing in the crown, or by a devise to charity, but operates only by annulling the devise absolutely.

That the construction aimed at by the plaintiffs would be totally destroying the statute of frauds, the great fence of our property, if a paper which may be forged after a person has made his will, shall be admitted to be a declaration of trust only in those persons, who had an absolute devise by the will without any trust.

The cases of superstitious uses are very different from this.

Superstitious uses are *mala in se*, and destructive to our constitution and government under the protestant religion, and therefore the law prohibits them; but it is not so with charitable uses, which have been always favoured, as in copyhold estates given by will to charitable uses, surrenders have been supplied.

The true foundation of this statute of mortmain was, that there was enough of land got into the hands of corporations that are indissoluble, and that even now charities may be established in the life-time of a person, but shall not be done in his last moments.

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That the judges have declared superstitious uses to be bad ones, which makes this case differ materially from them, and therefore is not at all affected by them.

That supposing this paper to have been a writing executed in the presence of three witnesses, yet it is not such a designation of a charity, as will take this case out of the statute of frauds.

Mr. Attorney-General in his reply said, there was nothing in the mortmain act which confines it to a trust in writing.

For it is *to any person in trust, or for the benefit of any charitable uses.*

So that if the intention can be made appear, whether it be in writing or not, it is equally within this statute.

The point the statute had in view, was to prevent the disinherison of heirs, and if the construction of the defendant's counsel should prevail, it would be a means of letting in an evasion upon this act.

[149] Acts of parliament of this kind are to be construed liberally and favourably, so as to suppress the mischief, and advance the remedy.

That there are several expressions in this paper which are not reconcileable to any thing but a charity; such as *I hope and doubt not but the said worthy William Cann will according to his undoubted generosity, and integrity, see performed, according to his wonted and well disposed charitable disposition towards all men.*

LORD CHANCELLOR,

I have been under some doubts as to the determination of this case.

Because on the one hand great inconvenience may arise, from means being found out to evade and elude the statute of mortmain: and on the other hand, it may be a dangerous thing to determine this case to be a trust; for I must break in upon the statute of frauds, by admitting parol evidence to prove the testator intended his estate for charitable uses.

Therefore to find out a medium was the great difficulty.

As to the present case, if the court can find a way of determining it, which will avoid the eluding the statute of mortmain, there is no reason to induce the court to make a strain which might affect the statute of frauds and perjuries.

It was a terror and apprehension which the testator had of this *mortmain* law, which induced him mistakenly to revoke the first will, from an imagination that it was within that statute; for if he had not revoked it, that will would certainly have stood, as it was made so long before his death.

But however this ought not to have any particular influence on my determination of the case.

There are three questions:

First, Whether this be a case within the statute of frauds and perjuries.

Secondly, Whether here is such a declaration of trust as is required by that statute.

Thirdly,

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Thirdly, If not a case within the statute of frauds, wheth, on the foot of parol proof, here is sufficient evidence of a trust for charity.

[150]

I am of opinion this is a case within that statute; for otherwise I should open a door to infinite inconvenience with regard to this statute, and which would considerably overbalance the mischief that can arise by leaving a loop-hole whereby to elude the statute of mortmain.

Consider that charitable uses are within both the clauses of the statute of frauds, as well within the clause of devises (1), as the clause relating to the declaration of trusts.

This has been determined, that there must be a declaration of trust, and that there must be a will duly executed, in order to create a charitable use; and even though such appointments have got the better of the statute *de donis*, and copyhold estate, yet that it is not a good appointment to pass freehold lands to a charitable use within this statute.

It was determined by Lord *Talbot*, in the case of the *Attorney General* versus *Spillet* (2), that the court could not set up a trust for a charity without a declaration in writing, notwithstanding there were such circumstances in favour of the charity, that the testator could not mean any thing else; and notwithstanding the devisees there, as well as here, were jointenants, the cause was reheard before me in *Trinity Term*, 1739, and I was of the same opinion, and the decree was affirmed (3).

It has been objected by Mr. Attorney-General, that there are words in the statute of mortmain, that go farther than the statute of frauds, and which were intended to take in parol trusts.

"That no lands, &c. shall be charged or incumbred to any "person *in trust, or for the benefit* of any charitable use what-"soever."

Mr. Attorney-General said, this is a new law, subject to the statute of frauds and perjuries, and that this act makes any disposition void for the benefit of a charitable use, whether in writing or not.

But I am of opinion this law has not abrogated the statute of frauds, which, being made for the publick good, ought *normam imponere futuris*.

The statute of mortmain has not abrogated the statute of frauds, which, being made for the public good, ought *normam imponere futuris*.

It is true, the statute of frauds cannot govern the particular provisions of that statute, but it must govern the construction of

The disabling statutes against papists must be construed by what is laid down in precedent acts; so in like manner the statute of frauds, though it does not govern the particular provisions of the statute of mortmain, yet it governs the construction of that act, as being a subsequent one.

(1) *Attorney-General* v. *Barnes*, 2 *Vern.* 598. 2 *P. W.* 260.

(2) 3 *P. W.* 344. S. C.

(3) *Ante* 2 Vol. 148. S. C.

subsequent

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subsequent acts, as under the disabling statutes against papists, they must be construed by the rules of law, and by what is laid down in precedent acts.

If it should be admitted, that the statute of mortmain took all these cases out of the statute of frauds, and was intended to introduce parol evidence, it would do more mischief by laying the foundation for a great deal of perjury, than it can possibly do good in any other respect whatsoever.

But, as I said before, this cannot be, for it must be construed conformably to the statute of frauds and perjuries.

The second question is, Whether there is in this case a proper declaration of trust? And this depends upon the construction on the paper writing of the 9th of *August*, 1738, called *Rules, Requests, &c.*

There is a mistake in it, as to the description of the will, but I lay no weight on this, except there had been another will in being, and therefore must take it to refer to the will of the 1st of *August*, 1728.

Consider whether from the nature of the paper it can be admitted as a declaration of trust and I am of opinion it cannot, for the reasons given at the bar, which are very proper ones.

If the testator had made a feoffment to himself and his heirs, and left such a paper, this would have been a good declaration of trust within the other clause of the statute of frauds.

But this present case arises upon the clause of the statute of frauds relating to a disposition of lands by will.

Here is a paper subsequent in date to the will, and therefore, if it had any effect, it would operate as a revocation of the will with regard to the beneficial interest in the estate.

The same solemnities required by the statute of frauds to dispose of a trust or equitable interest in freehold lands, as of a legal estate in such lands, nor can a testator revoke a trust, any more than he can devise it, without these solemnities.

But it is not executed with the proper solemnities; for, as to freehold lands, a man can no more dispose of a trust or equitable interest, than he can of the legal estate in those lands, under the statute of frauds, without these solemnities (1).

Neither can he revoke a trust, or equitable interest, in freehold lands, any more than he can devise it without these solemnities.

[152] If, by this paper, he had even named another person for his trustee, it would not have set aside the will, unless the devisee had by fraud prevailed upon the testator to give him the estate absolutely under the will, and told the testator, that after the will was executed, such a paper would be a sufficient declaration of the truft for a charity; but, upon the foot of a plain devise, and without any mixture of mistake, or fraud, it is not a good declaration of a trust.

(1) *Wagstaff* v. *Wagstaff*, 2 *P. W.* 258. *Duke of Marlborough* v. *Lord Godolphin*, 2 *Ves.* 76. *Jones* v. *Clough*, 2 *Ves.* 366. *Duff* v. *Dalzell*, 1 *Bro Cha. Rep* 147 *Cosson* v *Dade*, cited 2 *Bro. Cha. Rep* 541.

Ther

Therefore, I am of opinion, this paper is not within the meaning of the ſtatute of frauds, nor does it amount to ſuch a *declaration of a truſt* as is there required. ADLINGTON v. CANN.

But, thirdly, ſuppoſing it was not within the ſtatute of frauds, then, whether there is ſufficient foundation, conſidering the uncertainty of the proof in this caſe, to decree this to be a truſt for a charity.

Now, as to this, the caſe, to be ſure, is more doubtful; but yet I am not ſatisfied to decree it upon this foundation.

I do agree, that there does appear to be an inclination in the teſtator, that ſome part of his eſtate ſhould go to charitable uſes (1).

To be ſure, he was in apprehenſions of the ſtatute of mortmain, by the evidence which has been given of his deſiring the defendant *Cann* to lend him the act to read it over carefully: and, that this paper is a circumſtantial evidence, to ſhew his intention of giving ſomething to charity; for, I do agree, that theſe expreſſions, *Mr. Cann's worthy and well diſpoſed charitable diſpoſition, &c.* muſt otherwiſe appear abſurd.

But, how is it clear to me, that the teſtator, Mr. *Holliſter*, intended the whole for charity, or how much, if he meant only part of his eſtate ſhould go in that manner.

For, upon the evidence, it is manifeſt he did not intend the whole ſhould go to charity.

The defendant's witneſſes prove, that the teſtator had a great regard for Mr. *Cann*, and Mrs. *Andrews*, and that he declared he had given them great part of his eſtate, and that he himſelf told Mrs. *Andrews*, juſt before his death, he had made his will, and done well for her; and, that ſhe replied, I have a greater regard for your relations than my own; to which he anſwered, do not give away ſo much, as to leave too little for yourſelf.

But I do not reſt it on the defendant's proof, for the plaintiff's evidence, in ſome meaſure, correſponds with it, for her witneſſes ſay, that Mr. *Holliſter* deſigned *the greateſt part* of his eſtate to charitable uſes, which implies, they did not think he intended the whole. [153]

As to the charitable uſes, provided it was ſufficiently proved, and the ſtatute of frauds was out of the way, how am I to diſcover how much he intended to the deviſees, and how much to charity, or how ſhall I be able to draw the line between the deviſees and the charity.

He could not under this new will, by reaſon of the mortmain act, deviſe it directly; and he did not know, that in point of law, the old one was good.

What rule then has a court of equity to go by, to determine how much of the will is void, and how much of the teſtator's eſtate ſhall go to the plaintiff?

(1) It ſeems, that where a teſtator ſhews an intention to create a truſt, very ſlight expreſſions are ſufficient to effectuate that purpoſe, if they are made in the will. See *Harding* v. *Glyn*, ante 1 vol. 469, and the note thereto.

Beſides,

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Besides, very little inconvenience can arise from my determination, for this case cannot be liable to great objections, as a general case, because the instances of trustees abusing the trust of charity are so frequent, that they are a sufficient warning to reasonable men, not to leave their estates under such uncertainty, as to put them absolutely under a person's power, and then trust to his generosity for the disposing of them in charity.

The next consideration is upon the cases that have been cited of superstitious uses, and the construction of the law upon those statutes.

Now the court of Exchequer, in Lady *Portington's* case, held, that the statute of frauds did not extend to the King, and entered into parol proof upon this foundation.

But as I am of opinion the present case is clearly within the statute of frauds, it makes a material difference, and takes them from being precedents here: and for this reason, I am not obliged to determine whether the judgment of the exchequer in Lady *Portington's* case was right or not.

In Mr. Serjeant *Salkeld's* report of this case, it was a traverse to *an inquisition post mortem*, where the jury found for the King, but subject to the opinion of the court, whether the devise could be averred to be a trust to a superstitious use, and the court of King's Bench held it could not, and that both from the statute of frauds, and from the nature of the thing.

[154]

The King, in the exchequer, may proceed two ways, either on the *Latin* side, or on the *English* by way of information.

But after this, on the 26th of *May*, 1693, it came before the court of exchequer, upon an information for a discovery, and an application of the devise to an use truly charitable, for the King, in the court of exchequer, may proceed two ways, either on the *Latin* side, or on the *English*, by way of information.

The exchequer held, the statute of frauds did not bind the King, but took place only between party and party, because he is not named. Lord *Hardwicke* doubtful of this doctrine.

They held, that the statute of frauds did not bind the King, but took place only between party and party. I own, I am doubtful as to this doctrine, that the King is not bound by a statute unless he is expressly named.

There is a case, however, where it has been determined that he is not, and that is upon the sixteenth section of the statute of frauds, whereby it is enacted "that no writ of *fieri facias* or other "writ of execution, shall bind the property of the goods against "whom such writ of execution is sued forth, but from the "time that such writ shall be delivered to the sheriff, &c. to be "executed, and for the better manifestation of the time, such "sheriff, &c. shall, upon the receipt of any such writ, indorse "upon the back thereof the day of the month or year whereon "he or they received the same."

If extents granted by a baron, he marks the day of granting them, and they do not bind before that day, but where in a long vacation the teste is dated as of the last day of the precedent term, it shall prevail against intermediate acts between the King's debtor and other person.

Now the King, notwithstanding this clause in the case of *extents and executions*, is not bound by the teste; as, where in a long

long vacation, the teste is dated as of the last day of the precedent term; it shall prevail against intermediate acts between the King's debtor and other persons; though the practice is in extents granted by a baron to mark the day of granting them, and they do not bind before that day. ADLINGTON v. CANN.

As to what was mentioned by Mr. Attorney General, on the statute of usury, I have looked into it, and likewise into the statute of Queen *Ann*, which is penned in the same words, and where parol evidence has been admitted to shew *usurious* interest taken by a mortgagee, though there was none upon the face of the deed itself, is upon this clause, 12 *Ann. st.* 2. *c.* 16. *sect.* 1. "All bonds and assurances for the payment of any "principal or money to be lent upon usury, whereupon there "shall be reserved or *taken* above five in the hundred, shall be "utterly void."

Suppose a mortgage to be drawn only for five *per cent.* and the mortgagee takes six, it would be void upon the word *take* (1).

If a mortgage be drawn for 5 *per cent.* and a mortgagee takes six, it would be void on the word *take*, in the stat. of 12 *Ann.*

In the present case, it is extremely improper for the court to make a decree for the plaintiff; because the court cannot decree the devise to be void, since the making the statute of mortmain, any more than they could devise it to be a trust for the heir at law before the statute. [155]

But I am not under a necessity of interfering in this, because the plaintiff has a remedy at law (2) under the provision of the statute of mortmain, *sect.* 3. "that all gifts, grants, convey-"ances, &c. of any lands, &c. or of any stock, money, &c. "which shall be made in any other form than by this act is "directed, shall be absolutely, and to all intents and purposes, "void."

So that the devise of the legal estate is made void, and not merely the trust for the charitable use.

The trust then being made void, infects the legal estate, and makes void the whole devise, and then the land descends, and is exactly parallel with the stat. of 11 & 12 *W.* 3. relating to papists: and this point on the last mentioned statute came in question before Lord *King*, in the case of *Carrick* versus *Errington*, 2 *P. W.* 361. where it was held, that if all the persons who were to take the trusts were papists, it will make the legal estate void likewise.

Where the persons who are to take the trust are papists, it will make the estate void likewise.

There was another case of *Marwood* versus *Dorwell*, which came first before the court of Common Pleas, and afterwards, on a writ of error, to the court of King's Bench, whilst I was Chief Justice, and the whole court were unanimously of the same opinion.

The consequence of this is, that the plaintiff may bring an ejectment if she pleases; and, if so, I will retain the bill for a

(1) *Vide Fisher* v. *Beasley*, *Dougl.* 235.

(2) *Vide Doe* on dem. of *Phillips* v. *Alldridge*, 4 *Durn.* & *East* 264.

ARLINGTON v. CANN.

twelve-month, to give her an opportunity of trying it at law; for the plaintiff's is undoubtedly an hard case, as she is an only child, and heir at law; but this is all the relief I can give her.

The plaintiff not caring to be at the expence of a trial at law, but acquiescing under Lord Chancellor's opinion, the bill was dismissed without costs.

[156]

Case 50.

Ross versus *Ewer*, *July* 5, 1744.

S. C. cited 2 Vef. 63.

By a settlement before marriage 3000*l. S. S.* stock belonging to the wife was invested in trustees, who were to transfer one moiety to such person, &c. and for such uses, &c. as she should by her last will in writing, *or other writing*, under her hand and seal, to be attested by two or more credible witnesses, appoint, &c. and for want of such appointment, &c. then in trust to transfer all such stocks to her executor or administrators. After her death a paper was found in her closet of her hand-writing, by which she gave different sums to different persons but not signed or sealed by her, nor attested by witnesses. *Lord Hardwicke of opinion, that the words under her hand and seal to be attested by two or more credible witnesses, are referrable to the will as well as to the other writing, and for want of the ceremony of sealing, and attestation by witnesses, this paper was not a good execution of the power* (1).

IN 1734, there was a treaty of marriage between the defendant and *Ann Thompson*, widow, and she being possessed of *South-sea* stock and annuities, to the value of three thousand pounds, it was agreed, that the same should be vested in trustees; and in pursuance of this agreement, she did transfer her stock to trustees accordingly; and by an indenture of the first of *June* 1731, reciting the intended marriage, it was declared the same was in trust for *Ann* till the marriage, and then to pay all the interest and dividends to the defendant during the joint lives of him and *Ann*; and if she should die in his life-time, and there should be any children of her body by him living at her death, then to pay a moiety to him of the said stock, and the other moiety to such child or children; *and in case of no child living at her death (she dying in his life-time) then the trustees were to transfer the other moiety unto such person or persons, and to and for such uses, intents, and purposes, and in such manner as the said* Ann *should, in and by her last will and testament in writing, or other writing under hand and seal, to be attested by two or more credible witnesses, notwithstanding her intended coverture, limit, direct, or declare, and for want of such direction, limitation, or declaration, then in trust to assign and transfer all such stocks to the executors or administrators of the said* Ann; in which indenture was contained a proviso or power for the defendant and *Ann*, with the consent of the trustees, to revoke all or any of the trusts, and declare any other uses or trusts, as they should think fit.

The defendant and his wife having been married some time, and no probability of issue, she was prevailed upon by him to join in revoking the trusts as to one thousand pounds, and the trustees, by their directions, did assign one thousand pounds to the defendant.

Ann died in *April* 1741, and on the day she died, the defendant found a paper of her hand-writing in her closet, in the presence of one of her sisters, and another person, but not sign-

(1) In *Sprange* v. *Barnard*, 2 *Bro. Cha. Rep.* 585. It was held, that a *stamp* was equivalent to a *seal*, in the execution of a power, which requires sealing.

ed by her, nor sealed, nor attested by witnesses, and the defendant immediately took a copy of it, and then sealed the original under cover, which remained unopened in his custody, till the day he put in his answer; the defendant produced this copy at *Doctors Commons* when he took administration to his wife, on the 31st of *October* 1741, being informed there that the paper was of no signification. ROSS v. EWER.

A Copy of the Paper left by Mrs. *Ewer*, *December* 21, 1740. [157]

I declare this my will.

To sister *Elizabeth Taylor*	100
To sister *Sarah Ross*	100
To her son *Alexander Ross*	400
To pay his aunt *Taylor* twenty pounds a year during her natural life, and then to return to himself	
To *Ann Ross* fifty pounds } To *Dorothy Ross* fifty pounds }	100
To *Thomas Bodenham*	100
To *Edward Bodenham* fifty } To *William Bodenham* fifty }	100
To *Mary Branch* fifty pounds } To *Richard Branch* fifty }	100
To *Joys Kitford* fifty } Mr. *Hinchley* fifty pounds }	100
To two trustees fifty pounds	
To Mr. *E.*	100
To Mr. *Spring* a ring.	
To sister *M.* a ring.	
To Mrs. *Sarah Clampson* twenty pounds.	
To her daughter *Elizabeth* twenty pounds.	

The plaintiffs have brought their bill against the trustees, in whose names the stocks are now standing, that they may be compelled to make sale of a moiety of all such stocks as remained undisposed of at *Ann*'s death, and apply the money arising thereby, or so much as shall be necessary, to and among the plaintiffs, towards payment of the sums given them by the said paper writing, in proportion with several other sums thereby given to other of *Ann*'s relations.

Mr. Attorney General, for the plaintiffs: it may be said, perhaps, that though this paper writing is an appointment of money, it is not a proper one of stocks.

But if there is no other fund, out of which the sums given by this writing can be paid, yet, I apprehend, that this will be sufficient to intitle the trustees to transfer the stocks.

LORD CHANCELLOR,

You need not labour this, for the case will not turn upon it.

Mr.

Ross v. Ewer.

Mr. *Attorney General*, the first question is, Whether Mrs. *Ewer* has made a sufficient appointment within the meaning of the power.

[158] It may be said, perhaps, that this power cannot be executed without a writing in the presence of two witnesses, and under hand and seal; but it must be admitted to have been her own stock, so that she had an absolute dominion over it, and what she has reserved is out of her own property.

That the word *or* separates the clause, and the attestation relates to the words other writing only, and if so, then this is a will within the meaning of the power.

That *a seal* is not necessary to make a will good.

That the court will not strain to set aside this execution of the power, where the intention of Mrs. *Ewer* was plain to dispose of part of her stocks among the only relations she had, the plaintiffs.

Secondly, Where there is a trust for a wife's separate use, this court looks upon her as a feme sole.

If so, then this is a writing which would have passed her personal estate if she had been a feme sole, and it will equally pass the separate property of a wife, whom this court considers as a *feme sole*.

Mr. *Wilbraham* of the same side: It has been held in many instances, that though a wife cannot make a will, yet that she may appoint. *Cro. Eliz.* 27. *Eston* v. *Wood*. *Cro. Car.* 219. *Merriot* against *Kingsman*.

The present is a contract of the same nature with these cases at common law.

Whether this is so complete an instrument as would be esteemed a will in the spiritual court, is the question.

This is certainly a testamentary schedule at least, and would be regarded as such by that court.

Nothing can be stronger than the out-set here.

I declare this my will.

It is dated besides, and all written with her own hand.

Mr. *Tracy Atkyns* of the same side: Submitted that it was a good execution of the power: because the words *or other writing*, separated the sentence, as *or* is in its natural signification a disjunctive.

[159] That there is no instance of courts of law or equity construing *or* a copulative, except where the intention of the party required it, but was never so construed as to destroy an intention, or to defeat the execution of a power.

And therefore thought himself justified from the words themselves, to insist, that a will in writing unattested by witnesses, is a good appointment within the meaning of this power, as witnesses are not necessary to a will of personal estate, though they are to a deed, to which the drawer of this settlement has properly confined it. *Vide* 10 *Co.* 93. *Doctor Layfield*'s case, and 1 *Inst.* 7. *B.*

That, supposing there is any doubt in this clause, yet, in support of the execution of a power, there ought to be a favourable

construction, for though formerly taken strictly, yet latterly more liberally expounded. *Vide the Marquis of Antrim*'s case v. *The Duke of Buckingham*, 1 *Ch. Cas.* 17. *Swinbourne* 94, 519, 522. *Dyer* 72. *A.* 2*d case.* Ross v. Ewer.

The two last were in the case of land, and though not the same ceremonies were required *then*, in a will of lands, as since, under the statute of frauds and perjuries, yet lands were always of higher estimation in the eye of the law than a personal chattle, and notwithstanding it was held, that the real estate passed by these wills.

He also cited *Loveday* v. *Claridge*, in *Limbrey* v. *Mason*, Lord Chief Baron *Comyns* 452. and several other cases in the next page, to shew, that if powers are defectively executed, the court will supply it. *Vide Smith* v. *Ashton*, *Cas. in Chan.* 1 *vol.* 263.

To obviate the objection against these cases, that they have been where wife and children were concerned, and that this circumstance weighed strongly with the court in determining them, he mentioned *Gold* and *Rutland*, *Pasch. T.* 1719. *Eq. Cas. Abr.* 346. where there was no execution in writing pursuant to the directions of a power, but all disposed of by word of mouth, and in favour too of collateral relations (three nieces) to the prejudice of the husband, and yet Lord *Macclesfield*, on a bill brought by the husband to set this disposition aside, decreed for the defendants.

To apply the last case to the present.

Mrs. *Ewer* having reserved the stocks to herself, had an absolute power to dispose of them as she thought fit, and might have given them away absolutely, or upon terms,

That by this power she was made in the nature of a feme sole, and as such a disposition in that case would have been good, why not in this? Her administrator in that case could not have impeached such a disposition, no more can her husband in this, who has no other right but as an administrator. [160]

And therefore the disposition which she has made to the plaintiffs is perfect and complete, and hope that the judgment of the court will be accordingly.

Mr. Solicitor General for the defendant *Ewer*.

That he gave the plaintiffs an exact copy of this paper, and that they were so well satisfied that they had no right to any part of Mrs. *Ewer*'s stocks, that they did not attempt to hinder the defendant to take out administration to his wife.

He argued that the plaintiffs are not intitled on several grounds.

First, That this court cannot consider it as a will, for it has not yet been proved in the spiritual court.

Secondly, that taking it to be a writing only, and not a will, yet, if it is according to the power, that writing ought likewise to be proved first in the spiritual court; for though papers are admitted to be established there as a will, yet they will not admit every paper, for their doing or not doing so depends upon circumstances.

 It

Ross v. Ewer.

It is notorious in experience that the spiritual court do prove the will, where the feme covert has a separate power reserved over her estate.

Lord Chancellor,

Where a feme covert has a power to dispose of her estate by will, the writing she leaves ought first to be propounded as a will in the spiritual court, and if no executor is appointed they will grant administration to the husband with the will annexed.

I am of opinion that though in the notion of law a wife cannot make a will, yet where a feme covert has a separate power over her estate, and may dispose of it by will, whatever sort of writing she leaves, it ought first to be propounded as a will in the spiritual court; and in this case, as there is no executor appointed under this writing by the wife, that court would have granted administration to the husband with this paper or testamentary schedule annexed (1).

Therefore if the defendant's counsel do allow this to be a good execution of the power, I will direct the cause to stand over that the plaintiffs may have an oportunity of propounding this paper to the spiritual court.

[161]

But Mr. Solicitor General, insisting it was not a good execution of the power, went on as follows:

That the will ought to have had the attestation by two witnesses, and under hand and seal, because the words of the power are not by will or *deed* in the presence of two witnesses, but *by will or other writing*.

Now the words *other writing* may be set in opposition to a will properly made, and may refer to such a paper as she has left behind her, and proves strongly that she ought to have executed even this paper under seal, and in the presence of two witnesses. He cited for this purpose the case of *Dormer* v. *Thurland* 2 *P. Wms*. 506.

Mr. Attorney-General in reply said, if your Lordship thinks this ought to be propounded to the spiritual court first, we will not dispute it, but are very willing to try it there.

There are two sorts of instruments by which she might execute this power, the one a will, the other a writing.

The investing it in trustees' hands before her marriage shews her intention of preserving an absolute power over her property, and to prevent her husband from ever intermeddling.

If this is a will proper to be proved in the spiritual court, it is in effect admitting it to be a will within the meaning of the power, because it is very well known that they have no authority

(1) It should seem from some of the cases that the execution of a power by a *feme covert* is considerd as a *testamentary disposition*, and not properly as a *will*. *Cotter* v. *Layer*, 2 *P. W*. 624. *Henly* v. *Philips*, *ante* 2 vol. 49. *Southby* v. *Stonehouse*, 2 *Ves*. 612. *Jenkin* v. *Whitehouse*, 1 *Burr*. 431. However in *Marlborough* v. *Godolphin*, 2 *Ves*. 75. Lord *Hardwicke* said, that a *feme covert* might not only make a writing in the *nature* of a will, but also a *proper* will; if such will be made with the *consent* of the husband. See also *Mariot* v. *Kinsman*, *Cro. Car*. 219. *Henly* v. *Philips*, *ante* 2 vol. 49. *Oke* v. *Heath*, 1 *Ves*. 139. *Stone* v. *Forsyth*, *Dougl*. 707.

to meddle with an execution of a power by deed in the life-time of the person, which is to be under hand and seal, and where two witnesses are necessary. Ross v. Ewer.

He then endeavoured to distinguish this case from *Dormer* v. *Thurland*.

Lord Chancellor asked the Attorney-General, whether he thought that case would have been held good, if there had been no proof of a publication of the will.

He said he thought it would.

The Chancellor denied it, and mentioned the case of Mr. *Windham* of *Clear-well* in the court of King's Bench, which was a trial at bar upon the will of his uncle; and the only question was, whether the testator published it, for there was no doubt of his executing it in the presence of three witnesses, or their attesting it in his presence, which shews that *publication* is in the eye of the law an essential part of the execution of a will, and not a mere matter of form.

Publication an essential part of the execution of a will, and not a mere matter of form.

LORD CHANCELLOR, [162]

There are two questions in this case.

First, Whether this power is capable of being executed by any paper purporting to be a will.

Secondly, Whether the plaintiffs are proper to come into this court before the will is propounded to the spiritual court, of which I have already given my opinion.

But there is a question which is more material, and goes to the merits, that taking it one way or other, whether as a *will* or *paper writing*, the solemnity of sealing and attesting are necessary to both.

I am of opinion the latter words in the clause, *under her hand and seal to be attested by two or more credible witnesses*, are referable as well to the will, as to the other writing.

First, upon the intention of the parties themselves, and from the reason of the thing.

Then in trust to transfer the other moiety unto such person or persons, and to and for such uses, intents and purposes, and in such manner as the said Ann should, in and by her last will and testament in writing, or other writing under her hand and seal, to be attested by two or more credible witnesses, notwithstanding her intended coverture, limit, appoint or declare, and for want of such direction, limitation or declaration, then in trust to transfer all such stocks to the executors or administrators of the said Ann.

This is one entire sentence, and being so, the words are naturally referable to both.

Therefore the observation on the word *or* being a disjunctive, is not material in this case.

The meaning of framing it in this manner, was to give Mrs. *Ewer* a greater latitude than the words *will in writing* only would have done.

These words, *to be attested*, are as proper to a will, as to any other writing.

Now if this clause had been stopped, there would have been a comma after the word *writing*, and another comma after the

Ross v. Ewer. words *other writing*, and the next words by this means would, according to grammatical construction, relate clearly to them both.

[163] I do not deny the words may be construed in another sense, but would be much more strained than the other.

I take it that the fettering and circumscribing powers of this kind arise from jealousies on both sides.

First, On the side of the next of kin, that the husband may have such influence over her, as to prevail upon her to do some act to dispose of this money, which would prevent their having the benefit of it.

Secondly, The husband might apprehend, that there might be some undue methods used by her near relations, to surprize her into an act which might deprive him of the advantage he expected from her fortune.

Now this intention is the most rational, for in the execution of a power every sensible person would chuse to annex such circumstances to it.

The case of *Dormer* v. *Thurland*, in 2 *P. Wms.* is a much stronger case than the present.

Sealing a will being required by a power, not to be dispensed with.

Though sealing is not necessary to a will, yet being a circumstance required by the power in that case; Lord Chancellor *King* held that it could not be dispensed with (1).

There is nothing that requires so little solemnity as the making a will of personal estate according to the ecclesiastical laws of this realm, for there is scarcely any paper writing which they will not admit as such.

But in this case, to reject so material a part of the power, provided as a necessary caution in the deed, in order to prevent a disposition by surprize or undue means, is what this court cannot warrant, therefore I ought not to dispense with these circumstances in the execution of the power; for if this should be construed not to refer to a will, the husband might as well have allowed her to dispose of it without any restrictions at all.

The case of *Dormer* v. *Thurland* *, is an authority in point; if any thing, the present is stronger in favour of the defendant,

* Baron and feme seised in fee in right of the feme, by deed and fine settled the premisses to the use of the baron and feme for their lives, remainder to the first, &c. son in tail, remainder to the daughters in tail, remainder to the husband and wife and their heirs, with power to the baron, during the joint lives of him and his wife, by his last will, or any writing purporting to be his last will, under hand and *seal*, attested by three witnesses; if baron dies before his wife, to charge the premisses with 2000 *l.* The like power (*mutatis mutandis*) to the wife, if she die first, to charge the premisses with the like sum; husband by will under his hand attested by three witnesses, *but not sealed*, charges the premisses with 2000 *l.* held void, being without *a seal*. *Dormer* v. *Thurland*, 2 *P. Wms.* 506.

(1) See *Mac Adam* v. *Logan*, 3 *Bro. Cha. Rep.* 310.

ant, because it agrees with the clear intention of all the parties, that there should be the ceremony of sealing and attesting by witnesses, for the reasons I have before given, and therefore I must dismiss the bill, but without costs. Ross v. Ewer.

Ex parte Bowes, July 26, 1744. Case 51.

THE application was, for an infant trustee to join in suffering a common recovery, to make a conveyance effectual.

S. C. ante 1 vol. 605. note 1. An infant trustee may levy a fine, but doubtful whether he can suffer a recovery without a privy seal.

LORD CHANCELLOR,

It has been held that an infant trustee may levy a fine, upon the act of parliament, 7 *Ann. c.* 19. empowering infant trustees to convey estates, and the judges may take it, and it cannot be reversed but upon inspection, and during his nonage.

But I doubt whether judges would permit an infant trustee to suffer a recovery, unless he procured a privy seal for that purpose (1).

But however I shall pen my order in this general manner.

That all parties are to concur in all necessary acts, for the infant's suffering a common recovery, in order to make such conveyance effectual (2).

(1) *Sed vide Ex parte Johnson, post.* 559. *Ex parte Smith, Amb.* 624.

(2) *Reg. Lib. A.* 1743. fol. 537.

A Petition in the Name of the Attorney General, at the Relation of Gray and others, on behalf of the Charity, versus *Sir John Lock and others, Trustees of Magdalen College on Blackheath, under the Will of Sir John Morden, July* 26, 1744. Case 52.

LORD CHANCELLOR,

AT present the question is, whether I should be warranted, on such an application as this, to take a previous step to restore these persons to their places in the college.

The court will not examine into the reasons for an amotion of a pensioner from an hospital, with the same nicety as if the freehold of the person was in question.

It is incumbent upon this court to support the charity.

It is likewise incumbent on them to maintain and guard the power of those who have that authority from the donor.

For it would be of bad consequence to the charity, if the authority of persons intrusted with the management of the charity, was upon every instance to be enervated and broke into.

ATTORNEY GENERAL v. LOCK.

If there were to be the same niceties observed upon the amotion of some of the pensioners of an hospital, as if they had turned out a person from a freehold, no man of fortune or abilities would undertake such a trust.

Sir *John Morden* has not left the power of visiting to his heir, but has made a perfect constitution of this charity (1).

Now this is very material to the first and great question, the authority of the trustees.

They and the survivors are to have a power to place and displace the chaplain, treasurer, and other officers and merchants, *&c.* at their will and pleasure.

They have a power to make by-laws and rules for the regulating of the charity, and for the government and conduct of the house, which is a very general power; then he directs the said governors and visitors shall and may visit the said college once a year, or oftner if they think fit.

At which time they are to inspect the treasurer's accounts, and also to examine into the behaviour of the chaplain, *&c.* and if they find they have acted dishonestly and improperly, to displace them, and put other persons in their room.

And likewise if they find any merchant immoral, guilty of drunkenness, *&c.* they shall and may remove them.

If governors are visitors also, they are accountable to this court, *quoad* the estates of the charity.

The first objection is, that this is within the case of *Sutton* versus *Colefield*, determined *Hill.* 11 *Car.* and *Duke's Char. Uses* 68, 69. *pl.* 6. I agree that where there are governors who are visitors likewise, so far as relates to the estates of this charity, they are subject and accountable to this court.

There are two sorts of authorities here.

One as to the management of the estate and revenue; the other as to the management and government of the house.

In the latter they are absolute, and not controllable by this court; and is like the case of the *Attorney-General* versus *Price* (2), which came before me the 13th of of *July* 1744, where I was of opinion that the power of visiting was absolute in the Warden of *All Souls*, and this court had no right to interpose.

As to the question, whether they have an arbitrary power to remove at pleasure, I will give no absolute opinion, but I am inclined to think they have such a power of removing, without

[166] hearing or giving any reason for so doing.

My reasons are these:

By the constitution of this charity they have a power of removing the chaplain, treasurer, and other officers, at their will and pleasure.

If it had rested there, there is no doubt but they might have done it; but it is insisted by the Attorney General that there is another clause restraining them.

(1) *Vide Attorney General* v. *Master and Fellows of Clare-Hall*, *post* 662.

(2) *Ante*, 108. S. C.

But

ATTORNEY GENERAL v. LOCK.

But I think the latter clause is not a restraining clause, or gives them less power, but only lays an injunction or obligation upon them to remove for such general offences, and leaves them in every instance besides to act at their discretion.

But afterward, in their general local visitation, they are to call the treasurer to account.

This they might have done by virtue of their being governors, and therefore it is an injunction upon them to inspect the treasurer's accounts, &c.

Are they to remove the officers and servants for an offence that must be supported in a court of justice, with the same legal nicety as in the case of a freehold?

Is the chaplain or treasurer an officer for life?

They would, if so, be equally restrained from removing them as the merchants themselves.

As *to the merchants*, if guilty of drunkenness or any debauchery, then they shall and may by writing under hand and seal turn them out.

The words *shall and may* in general acts of parliament, or in private constitutions, are to be construed imperatively, they *must* remove them.

Shall and may in acts of parliament, or in private constitutions, are to be construed imperatively (1).

Upon the whole of this point I am of opinion that there is a general power of amotion, but, as I said before, the founder has laid an obligation upon them to turn out for the *majora crimina*, if I may so call them.

Next as to the relators; and first, as to Mr. *Gray*.

It has been said that this is only a decent application for an account of the charity.

But I think the letter he sent to the governor is very gross, and almost a libel, for saying that they have *fifteen thousand odd hundred pounds* in their hands, certainly carries a reflection with it. [167]

The other two relators admit themselves to be privy to the letter.

The great difficulty with me is the danger of making a precedent of restoring a mere pensioner of an hospital, upon the application of the pensioner himself.

Consider what number of great hospitals there are in this kingdom, and how bad the consequence would be for me to examine too nicely into these *amotions*, as if the freehold of a person was in question.

The governors of these hospitals every day, turn out, and put in, and there would be no end of such inquiries, and would be a means of overturning these charities absolutely.

This is, as has been very justly said, to make a decree before the cause is heard upon motion, and even before an answer is put in.

(1) *Stamper* v. *Millar*, *post* 212.

ATTORNEY GENERAL v. LOCK.

Suppose it was an information against a schoolmaster; would the court turn him out? Or would they restore him upon a motion, without hearing the cause?

If you will compare it to cases at law, compare it throughout.

Suppose a *mandamus* from the court of King's Bench to restore a person to an office, would the court in a summary way do it without examining regularly into the merits of the case? Certainly not.

It would be a much less prejudice to the foundation, if one of these pensioners should be turned out wrongfully, than that the trustees and governors should be perpetually liable to have every action of theirs sifted and examined into.

But yet I would recommend it to Sir *John Lock*, and the other gentlemen's consideration, to allow something in the mean time to the petitioners, that they may not starve, but I will not make any order for it.

N. B. The defendants in their petition this day to the Master of the Rolls had been allowed a month's time to plead, answer or demur to the relator's information, so as not to demur alone; and it was ordered that all process of contempt for want thereof be in the mean time stayed.

[168] *Ex parte Barnsley, July* 30, 1744, *among the Petitions in Lunacy.*

Case 53.

The Inquisition.

S.C. post 184. 2 Eq Ab 580. That *W B.* was incapable of governing himself and his lands, &c. is an illegal and void return to an inquisition of lunacy.

TO inquire whether *William Barnsley* is a lunatick, or enjoys lucid intervals, so that he is not sufficient for the government of himself and his affairs.

The return of the Inquest.

That the said *William Barnsley*, at the time of taking this inquisition, is, from the weakness of his mind, incapable of governing himself and his lands and tenements, and has been so from the 8th of *April*, 1737, and upwards, but how and in what manner the said Mr. *Barnsley* became so, know not.

The petition is preferred to quash the inquisition as being an illegal, and a void return.

Mr. Attorney General for the petition.

There are four grounds of lunacy, according to 1 *Inst.* 247. *a.* and *Beverley*'s case, 4 *Co.* 123. *b.* *Sickness*, *Grief*, *Accident*, and *Drunkenness*; none of these are mentioned in the return.

In

Ex parte BARNSLEY.

In a case *ex parte Freak* (1), *January* 11, 1732, the jury upon an inquisition there found that by *his* appearance he was not always in his senses as other men be, and that it arises from *Fear* and *Provocation*.

This was quashed.

Ex party Harvey, *February* 26, 1733, 7 *Geo.* 2. There it was found that *she* is not of sufficient understanding to manage her own affairs.

This was quashed by Lord *Talbot*.

In a case that came before the court on the 4th of *May* 1733, the finding was, that she is so weak in her judgment and understanding that she is not capable of managing herself and her estate, and has been under the same weakness for twenty years last past.

In this a committeeship was granted; this amounts to no more than a precedent *sub silentio*, for it was never controverted.

Robert Ashton the 8th of *December* found not a lunatick, but *incapable*, this was *quashed*. [169]

Ex parte Read, *July* 7, 1654, the person being not found by express words, whether he is a lunatick or not, was likewise quashed.

Mr *Brown*, of the same side, cited 2 *Inst.* 405. and that the return in the inquest in the precedent of 1654, found, that he was not sufficient to manage his person and estate, and because they did not find expressly that he was *a lunatick*, the court held it did not fall within the inquisition, and quashed it.

Mr. *Noel*, of the same side, mentioned the late act of parliament, where an incapacity of marrying is made the consequence of a person's being found a *lunatick*.

As the act uses the word *lunatick* only, it would be of dangerous consequence to add a different sort of lunacy here, and under the act of parliament.

Mr. *Wilbraham* of the same side.

That there must be an absolute finding, and that they cannot find *an inference* only, without finding a positive fact.

In the case of *Dennis* versus *Dennis*, 2 *Sand.* 352. on a writ of dower it was insisted she was *idiota*, and pleaded that she was *sanæ mentis*.

He said he mentioned this to shew that *sound mind* was of certain signification, and known in our law; and that you cannot in pleading say that a man was *lunaticus*, but *non sanæ mentis*.

Here it would be impossible upon the inquisition to know what *to plead*.

And if the court should break that great land-mark, that a person to be a lunatick must be found to have some degree of unsound mind, they would not know how to stop.

Mr. Solicitor General of the other side.

(1) *Sel. Ca. Cha.* 47.

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That this return is agreeable to many precedents, and agreeable also to reason that a commission should issue upon this inquisition.

The order was made upon the 28th of *April* last, the attendance upon the inquisition was by counsel on both sides, that it took up *seven days*, and the jury were unanimous.

[170] In the notion of the old law and writs, one of which is to inquire *de idiota*, and the other *de lunatico*, he must be found one of these.

The counsel for the petitioner insist that the return of the inquisition must be, that he is or is not an ideot, that he is or is not a lunatick; and in support of this, they cited a precedent during the usurpation.

The court in these determinations found themselves upon this, that the inquest did not in express words find him a lunatick.

LORD CHANCELLOR,

The commissions are framed in analogy to this writ, and if the inquisition is, whether he is *a lunatick*, they cannot find him *an ideot*: but there must be a new commission.

Mr. Solicitor General.

The law having varied it under these two heads, and the jury being doubtful whether in conscience they could find him a lunatick, the court in many precedents allow the jury not to find him in express terms a lunatick.

In the case *Ex parte Pauncefort*, *October* 11, 1725, the inquisition returned, *est insanæ mentis, & sic deprivatus rationis & intellectus, ita quod regimini sui & ipsius status sui omnino incapax existit.*

It was allowed to be a good finding, and the commission issued.

Your Lordship too proceeded upon this reasoning in the case of *Ashton*.

Mr. *Clarke* of the same side.

That the court have exercised a more liberal use of this power, as standing in the place of the crown, and if the gentlemen should prevail to overturn this finding, it would shake all the determinations for a century past.

That weakness of body in wills, is put in opposition to soundness of mind, and therefore if this had been an inquisition in *Latin*, they would have used *insanitas mentis*.

LORD CHANCELLOR.

I much doubt whether this would express weakness of mind, and if it ought not to have been *infirmitas mentis*.

[171] Mr. *Clarke*: That saying from the weakness of his mind he is incapable of managing himself and his fortune, is saying the same thing as that he is weak, and that he is incapable of managing himself and his fortune with proper averments; and that this is warranted by grammatical as well as an equitable construction.

That the case of *Ashton* did not come before the court *sub silentio*, but upon a second finding of the inquisition, for my Lord *Talbot* was not satisfied with the first.

LORD

Ex parte BARNSLEY.

LORD CHANCELLOR,

Though I am desirous of maintaining the prerogative of the crown in its just and proper limits, yet at the same time I must have a care of making a precedent on the records of the court, of extending the authority of the crown, so as to restrain the liberty of the subject, and his power over his own person and estate, further than the law will allow.

The court cautious of extending the prerogative of the crown, so as to restrain the liberty of the subject, or his power over himself and his estate, further than the law will allow.

Notwithstanding what has been said of the change of the law, I think the prerogative of the crown, and the rule of law is still the same, and cannot be altered but by act of parliament, for it is only the form of returns that is changed by this court.

The question is, Whether here is such a finding returned, as will intitle this court to take the care upon them of Mr. *Barnsley*'s person and estate. *Vide the words of the inquisition as before.*

Now it is certain, and is admitted, that this is a departure from the direction of the commission, for the commission is to inquire whether he is a lunatick, or with lucid intervals, so that, &c.

But though the return differs in words, yet if there are equipollent words, it will not be such an objection as will quash the inquisition.

For it is not a variance in the words, but in the sense and meaning that will quash it.

Now it must be admitted, that the modern precedents have departed from the ancient form, which was before, that they must return whether he is *lunaticus vel non:* And I was apprehensive that the form had been too various, but, upon search, I was glad to find that, except in two or three instances, the return has been that he is *lunaticus*, or *non compos mentis*, or *insanæ mentis*, or, since the proceedings have been in *English*, of unsound mind, which amounts to the same thing.

The uniform return in inquisitions of lunacy, except in a few instances, is *lunaticus*, *non compos mentis*, or *insanæ mentis*, or, since the proceedings in *English*, of unsound mind.

And I shall desire that they may still continue so, or else it will introduce great uncertainty and confusion.

[172]

In constant experience, where a cause comes on here, upon a suggestion of a person's being imposed on by weakness, when the counsel are asked, do you proceed on the insanity, the answer is always, No! We go upon fraud and weakness only; and this is the invariable distinction in causes of that kind.

Possibly the law may be too strict, and it might be useful in some cases, that a curator or tutor should be set over prodigal and weak persons as in the civil law.

Useful in some cases, if a curator could be set over weak persons, as in the civil law.

Consider the modern cases, and the rule the court goes on in those cases.

In two of the instances *ex party Halsey*, and *ex parte Pauncefort*, the inquisition found that the parties were incapable of managing, &c.

Which

Ex parte BARNSLEY.

Which was finding the effect, as was truly said, instead of the cause.

But that was not the ground of quashing it, but quashed, because it was not a sufficient finding of the lunacy by Lord *Talbot*.

Ex parte Pauncefort was before me and quashed for the same reason.

The other two were a second finding in the case of *Halsey* and Mrs. *Wall*'s case.

I own, if they had come before me, I should have doubted, whether this second finding ought not likewise to have been quashed.

There is a departure from the legal words, for the jury do not find that she was *non compos* or of *insane mind*, but only *weakness* for the last twenty years.

Lord *Talbot* granted the commission, but however, I must take this as a commission which passed *sub silentio*, for no counsel were heard upon it, and therefore it is no precedent; and I believe I should have done the same, as it was applied for at the unanimous request of all the friends and relations.

The finding, *that she was not capable of given answers to the most easy questions*, was improper.

[173] But my Lord *Talbot*, I dare say, laid no stress on this, because it is a finding of evidence, which a jury ought not to do, but to return the fact, or if they do return, that she is not capable of answering, &c. they should expresly state the questions themselves.

The other case of Mrs. *Wall* was a much weaker, they find her *worn out with age*, and *incapable of managing her own affairs*.

Now, as they have not applied the being worn out with age to *her mind*, she might be bedrid only, and yet of good understanding, and capable of directing her affairs.

Then it will come to this question, Whether the finding in the present case is of the same signification, and equivalent to finding Mr. *Barnsley* a lunatick, *non compos*, or of unsound mind.

There are various degrees of weakness, and strength of mind, from various causes.

There may be a weakness of mind that may render a man incapable of governing himself, from violence of passion, and from vice and extravagancies, and yet not sufficient under the rule of law, and the constitutions of this country, to direct a commission.

Courts of law understand what is meant by *non compos* or *insane*, as they are of a determinate signification.

Being *non compos*, of *unsound mind*, are certain terms in law, and import a total deprivation of sense; now weakness does not carry this idea along with it; but courts of law understand what is meant by *non compos*, or *insane*, as they are words of a determinate signification.

My Lord *Coke*'s definition is, that they are persons of *non sane memory*.

Non compos mentis is a technical term, and now legitimated under several acts of parliament.

Non compos mentis is used in the statute of limitations, so that it is legitimated now under several acts of parliament.

Several

Several words are legitimated by act of parliament to a particular sense, which before might bear a different meaning. *Ex parte* BARNSLEY.

I remember a case before the court of King's Bench, when I was Attorney General, upon a pardon, where it was directed he should give security *nostris justitiariis de banco*. *Nostris justitiariis de banco* are applicable to the court of King's Bench.

Now this is the title of the court of Common Pleas.

The case stood over upon this point, and Lord Chief Justice *Eyre* found in *Magna Charta*, that the court of King's Bench were called Justices of our Bench; and this was held to have so *legitimated* the word, that the pardon upon this was adjudged to be a good one.

Lunatick is a technical word, coined in more ignorant times, as imagining these persons were affected by the moon; but discovered by philosophy and ingenious men, that it is entirely owing to a defect of the organs of the body. [174]

The reason of the courts enlarging the manner of finding, was, to avoid the difficulty of obliging the jury to find express lunacy, because they might think it more a case of idiocy, which was equally a case that called for the care of the court.

The reason that Lord *Wenman* was so long before he could be found *so*, was the unwillingness the jury had to find him an idiot, because of the consequence; but upon an inquisition of lunacy, they found him a lunatick immediately.

Here *no traverse* can be taken, but an involved one, for the fact that must be traversed, is only the inability to govern himself and his affairs, and the traverse ought to be upon the lunacy only.

Therefore I am, for this reason of opinion, that the inquisition must be quashed: and I am extremely glad to find, upon search of precedents, that the court has not gone further in departing from the legal definition of a lunatick.

The inquisition was quashed accordingly.

Carte versus *Carte*, *March* 8, 1744. Case 54.

SAMUEL *Carte*, the plaintiff's father, was a prebendary of *Tachbrooke*, to which there is a corps belonging that fell to him in 1714; from that time, he, by indenture, demised it to one of his children for 21 years; and such child that was named *lessee* always executed a declaration of trust, declaring that his or her name was made use of in such lease, in trust for the father for so many years as he should live of the term, and then for such person or persons as he should by deed or will appoint, and in default thereof, to and among all his children equally; such *lessees* generally surrendered the lease yearly, and *Samuel Carte* granted a new one.

S. C. Amb. 28. 2 Vef. 419 S. C. cited. Lord *Hardwicke* of opinion, the will in this case was sufficient to pass, not only the trust of the leases then in being, but also the benefit of the subsequent renewals, to the plaintiff.

In *August* 1735, *Samuel Carte* leased the prebendal estate to his daughter *Sarah*, the defendant, who executed a declaration of trust: On the 19th of *January* 1735-6, *Samuel Carte* made his will, and after giving some legacies, bequeaths to his eldest son

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son *Thomas*, the plaintiff, all the rest of his goods, chattels, and estate, whether real or personal, in possession and reversion, and makes him executor.

[175] Then by a supplemental clause: *Item*. It is my mind and will, that my eldest son *Thomas* shall have the dispofal of the lease of my prebend of *Tachbrooke*, made to my daughter *Sarah*, and that he should receive to himself all the *profits* and *advantages* arising and accruing from it.

By another clause, subsequent to this, and which is contended by the plaintiff to be made after the 24th of *September* 1739, he therein takes notice, that he had made his son *Thomas* executor and residuary legatee, and *that if he should be molested and prosecuted by the government, by which he might incur a forfeiture, or could not be his executor*; then he makes the defendants *Samuel*, another son, and *Sarah*, his daughter, executors, and gives them what he gave to his son *Thomas*.

The lease in the year 1735, devised under the will, was surrendered in 1736, and several new leases were made yearly until the subsisting lease, the lease in question, which was dated the 24th of *September*, 1739, and made to the defendant *Sarah*, who, on the same day, executed a declaration of trust, in trust for the father, for so many years as he should live of the term; then for such person or persons as he should by deed or will appoint, and in default thereof, to and for the benefit of the defendant *Sarah*, and every other child of the testator, share and share alike.

The 16th of *April*, 1740, *Samuel Carte*, the testator, died.

The bill was brought by *Thomas*, the eldest son, claiming the whole benefit of the lease in 1739, and praying that the defendant *Sarah* might assign it to him; and that if the court should be of opinion that he is not intitled to the whole benefit, that then he might have a third.

The defendants, *Samuel* and *Sarah*, say, that the plaintiff is only intitled to a third, for that the lease in 1739 is a revocation of the will, and did not pass by it.

LORD CHANCELLOR,

The general question is, Whether the benefit of the renewed lease in 1739, passed to the plaintiff, by the will of his father in 1735, either by the original will, or subsequent additions to the will: and this general question depends upon these considerations.

First, Whether the will of the 19th of *January*, 1735-6, was sufficient to pass not only the trust of the leases then in being, but also the benefit of the subsequent renewals, in case there had been no new declarations.

[176] Secondly, Whether the new declarations of trust that have been made on the subsequent lease, will make any alteration in this case by the different penning of them, and whether they amount to a revocation.

Thirdly, Supposing there was a revocation of the will, either by the subsequent renewal, or by the new declarations that were made upon those new leases, whether here is sufficient evidence

of the republication of the will, after the lease and declarations of trust of the 24th of *September*, 1739. CARTE v. CARTE.

These three questions take in all the points that have been made in this cause.

As to the first, I am clear of opinion that the will was sufficient to pass it under the circumstances of this case.

The cases of revocations of wills, legacies, and terms of years by surrendering and taking new leases, have been all of legal interests; and not upon a legacy of a trust estate in a term of years (1).

Revocations of wills, legacies, &c. by surrendering and taking new leases, have been all in the cases of legal interests, and not on a legacy of a trust estate.

The case in *Goldsborough* 93, and of Sir *Thomas Abney* versus *Miller*, *June* 10, 1743. *Vide* 2 *Tr. Atk.* 593. were of a legal estate then subsisting.

The penning of the last was very strong to confine it to the term then in being, *as it was a bequest of the lease which I now hold*, and the testator had only the legal estate in him.

(1) Lord *Hardwicke* seems to lay particular stress upon the circumstance of this being the case of a *trust*; and in *fol.* 179. he observes, that "an abundance "of acts are sufficient to pass the *trust* "or *equitable interest*, which would not "pass it at law." In *Abney* v. *Miller*, *ante* 2 vol. 593, the testator had the *legal* estate in the leases, but by his will had devised them in *trust*: But in the above case of *Carte* v. *Carte*, the testator himself was a *cestuique trust*. This distinction accounts for an observation of Lord *Hardwicke* in *Abney* v. *Miller*, and reconciles it with what his Lordship is here reported to say. The passage, I allude to, runs thus, "This court does regard "the custom of renewal in some cases, "because if such an estate is given upon "*trust*, and the estate so given is renewed "*after* the death of the donor, yet the "court considers it as governed by the "*old trusts*, (see *Pierson* v. *Shore*, *ante* 1. "*vol.* 480, and note), with respect to "persons claiming under the testator; "and the *executor* renewing would have "been bound by the trust; *but this "will not extend so far as to bind the testator himself in his life-time, under any "trust that he may have created.*"

However the general rules in respect to cases, where the *legal* interest of a *term for years*, is the subject of bequest, are submitted to be as follow; 1st, if the intention of the testator, collected from the words of the will, appears to be, that the bequest should only extend to the specific lease then in being, as where the testator bequeaths the lease, which he *now* holds, or all his lands, &c. generally (without giving all his *estate* or *interest* in those lands, &c.) then and in such cases the subsequent renewal must be considered as a revocation of the former devise. *Gold.* 93. *Abney* v. *Miller*, *ante* 2 *vol.* 593. *Rudstone* v. *Anderson*, 2 *Ves.* 418. *Attorney General* v. *Downing*, *Amb.* 573. *Hone* v. *Medcrafte*, 1 *Bro. Cha. Rep.* 261. *Coppin* v. *Fernyhough*, 2 *Bro. Cha. Rep.* 291. 2dly. But where the words of the will are sufficient to pass not only the present existing lease, but also the interest in the renewed leases, as where the bequest is of *all* the testator's *leasehold estate*, or of *all the interest*, which he has in such a lease, then the court will not construe the subsequent renewal to be a revocation. *Carte* v. *Carte*, *infra*. *Adean* v. *Templar*, 3 *P. W.* 168, *ante* 2 *vol.* 599. *Stirling* v. *Lydiard*, *post.* 199. 3dly, The renewal of a lease *for lives* is always considered as a revocation; because it being a *freehold*, the renewed lease is as a new purchase of a freehold estate, which cannot pass by a will previously made. *Marwood* v. *Turner*, 3 *P. W.* 170, *ante* 2 *vol.* 597.

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The question here arises altogether on the penning of the will, and not from the inability in point of law to give it; the case of *Bunter* versus *Coke*, *Salk*. 237. and the rest of those cases depend upon the particular penning.

There is no question but a man by will may bequeath a term of years which he has not in him at that time, but comes to him afterwards.

Therefore all these cases of revocations of legacies or bequests of terms for years arise from the short penning of the will: and if in the case of *Abney* versus *Miller* the testator had said, *I give all the interest I have in the lease*, there is no doubt but it would have passed.

So that there is no question concerning the inability to devise, but the want of a proper form of words.

If that is so, and a form of words may be used, which would pass a subsequent renewed interest after making the will, then the question is, Whether the words here are sufficient to pass this interest: and clearly they are.

[177] I take the construction of this clause in as extensive a manner as if he had particularly recited and repeated the lease and declaration of trust and given it to his son, and the effect would have been to have given him the whole trust.

What was that?

Most certainly not the trust of the then existing term only, but also all the renewals, and extends to all future leases as well as those in being.

An objection has been made that this declares the trust upon the present term in *Samuel Carte*.

It is not only a trust to preserve the legal estate to *Samuel Carte the elder* in the profits, but to preserve the trust in the whole interest, by giving him a power to surrender it to such use as he should appoint.

What is the whole of it taken together? Why, that *Samuel Carte the elder* should receive the profits of the lease during his life, and that it shall be surrendered as he shall direct.

What for?

Why to take a new interest for the benefit of the same trust.

If the testator had recited in his will as before, could there be any doubt but that would have given to the plaintiff the benefit of this lease and all subsequent renewals?

It is the same as if a man possessed of a term had given that lease, and all such leases as I shall take, which amounts exactly to the same thing.

This is only making a consistent construction.

Suppose, instead of the declaration of trust for *Samuel Carte* for such uses, *&c.* the declaration of trust had been for particular persons; and the lease had been renewed from time to time.

No body would have doubted but the subsequent renewals would have been for the benefit of the persons named in the declaration of trust; Will it make a difference if the persons are not named? No.

Suppose

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Suppose it had been for such persons as he should by any deed (not by will) appoint: and he had made a declaration for particular persons, by an instrument distinct from this declaration.

Would not that have been for the benefit of such persons?

The word *advantages* sufficient to take in all the benefits belonging to the trust, not the profits only but the renewals, which are consequential.

*The devise in this will extends to the whole trust, and the word *advantages* is undoubtedly sufficient to take in all the advantages and benefits belonging to the trust.

[*178]

It comprised not only the profits, but the renewals, which are consequential.

The words of the will are very sufficient to pass, not only the trust and beneficial interest then subsisting, but also the renewed lease.

Mr. *Samuel Carte's* making new declarations of trust on every surrender *ex abundanti cautelâ* creates all the difficulty; for if he had rested it upon the first, there could have been no doubt.

Secondly, Whether the new declaration of trust that has been made on the subsequent leases will make any alteration in this case by the different penning of them, and whether they amount to a revocation.

It would be a very unfortunate case, if those acts which the testator most undoubtedly meant should carry on the same intention, and preserve the estate in the same manner, should have this effect to revoke and alter the will, but if they are revocations in point of law they must prevail.

But the question is, if they have so done, and I have more doubt of that than the former part of the case.

Though he might have made it irrevocable in his life-time, not by way of will, but by way of disposition, whereby it would have been out of his power to revoke it, and it would have been subject to the trust, yet he has not done it in that way, but by his will, which is a revocable act in its own nature.

Then the question is made by the counsel, whether these words *by his last will and testament* shall refer to the act of making his will, or to the legal operation.

If to the first it is future, if to the latter, why then it is the operation only is future.

I cannot find any case where such construction has been put upon the operation of a will.

I do not know how far this may affect copyhold cases, for upon surrendering such estates to the use of a will, I do not remember that it has ever been asked whether the will was made before or after the surrender (1).

Therefore as this may be of very great consequence to people, I am unwilling to determine it. [179]

The operative part of a will is upon the point of th testator's death.

(1) *Heylin* v. *Heylin*, *Cowp.* 130. *Sed vide Warde* v. *Warde*, *Amb.* 299. *Doe* v. *Davy*, *Cowp.* 158.

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There is great force upon that reason: but no point has been determined of that kind, and I shall not determine this case upon that question, nor is it material, because I am of opinion for the plaintiff upon the last question, as to the republication.

In a case of this sort where it will be manifestly contrary to the testator's intention, this court will not extend it further than is absolutely necessary.

A court of equity does not favour revocations of wills contrary to a plain intention of the testator.

This court upon revocations it is said must go by the same rule as courts of law: and though this is rightly laid down, yet a court of equity does not favour revocations contrary to the plain intention of the testator.

That this court in revocations goes by the same rule as courts of law, holds only as to descents of estates, or successions of property, or to the effect of limitations of estates.

But that rule is not applicable in this case, because it only holds as to descents of estates or successions of property, or to the effect and force of limitations of estates, and great mischief would arise from construing them differently here than at law.

But abundance of acts are sufficient to pass the trust, or equitable interest, which would not pass it at law (1).

Where an estate has been devised before it was mortgaged, the devisee takes the equitable interest subject to the charge.

One instance was mentioned by counsel, the case of mortgages, that where the estate has been devised before it was mortgaged, the devisee takes the equitable interest subject to the charge (2), and the court there does not follow the strict law.

As to the republication, the strength of evidence is for the plaintiff, and though not quite clear, yet I am satisfied there was a republication, and that the addition to the will was after the lease and the declaration of trust.

As to the objection which I myself made with regard to the propriety of this court's taking notice of it as a codicil, if I was to send it to the ecclesiastical court what could they do, it would stand as a will with a date to it, and a codicil annexed without any date.

And therefore there is no occasion for a further inquiry in the ecclesiastical court, because this court may take cognisance of it: for was the ecclesiastical to reconsider it, the question would still revert to the same thing here with regard to the point of time when the codicil was executed.

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The addition of a codicil is a republication of a will.

There is no doubt but the addition of a codicil is the republication of a will (3), and it is not disputed at the bar.

(1) *Ante* 176. note.

(2) Vide *Parsons* v. *Freeman*, *post.* 748.

(3) So *Alford* v. *Alford*, 3 *P. W.* 168. 2 *Vern.* 209. *Potter* v. *Potter*, 1 *Ves.* 443. *Gibson* v. *Lord Mountford*, *ibid.* 485. *Doe* v. *Davy*, *Cowp.* 158. *Coppin* v. *Fernyhough*, 2 *Bro. Cha. Rep.* 291. *Attorney General* v. *Downing*, *Amb.* 573. In what cases a codicil does not amount to a republication, Vide *Simpson* v. *Hornsbey*, *Pre. Cha.* 441. *Strode* v. *Falkland*, 2 *Vern.* 625. *Drinkwater* v. *Falconer*, 2 *Ves.* 626.

As

As to the provision in the will *in case Thomas Carte should be molested and prosecuted by the government, &c.* CARTE v. CARTE.

The sense and meaning is, that if any such accident should happen before the death of the testator, then this clause should take effect, for a man may name one person executor, and upon a particular contingency appoint another.

A man may name one person executor, and on a particular contingency appoint another.

But I would not have it understood that I construe this a continuing clause; for suppose a man gives an estate to *A.* and his heirs, but in case he commits treason within such a term of years it shall go over; this is a void clause, and would be abrogating the law (1); the same as to an estate-tail.

A devise to a man and his heirs, or in tail; but in case he commits treason within such a term, it shall go over; this is a void clause.

Such a thing happening before the testator's death, is before an interest vests in the executor, and is not a continuing interest; and a man may by his will substitute another legatee, or executor, if the first should by treason forfeit during the life of the testator; but if he meant to extend this beyond the term of his own life, it could not take effect, for if it should, it would be a plain evasion of the statute of *Hen.* 8. and other acts made concerning treason.

A man may by will substitute another executor, if the first should by treason forfeit during the life of the testator; but if he means to extend it beyond the term of his own life, it could not take effect, as it would be an evasion of the acts made concerning treason.

His Lordship decreed *in toto* for the plaintiff (2).

(1) Vide *Moor*, 633. (2) *Reg. Lib. A.* 1744. fol. 261.

Roome versus *Roome, March* 9, 1744, *in Lincoln's Inn Hall, before the Master of the Rolls, sitting for the Chancellor.* Case 55.

[181]

STEPHEN *Roome* by will, dated the 27th of *January* 1740, " gives to the plaintiff *William Roome* and his heirs, " all his messuages, lands, &c. in *Islington*, which he pur- " chased of *Thomas Anstrope*; then directs his executors to " place out at interest or government securities one thousand " pounds in their own names, and directs that the interest or " dividends thereof, or of such part thereof as they should " think necessary, should be applied for the maintenance and " education of his grandson the defendant *Stephen Roome*, son

One question was, whether the want of a surrender of a copyhold estate shall be supplied in favour of a wife or child, the court doubtful whether it could against an heir disinherited of the real estate.

S. R. directs his executors to place out at interest 1000 *l.* in their own names, and that the interest should be applied for *the maintenance, &c.* of his grandson, and that they might pay all or any part of the 1000 *l.* and interest in binding him apprentice, and so much as should not have been so applied, he directed should be transferred to his grandson at 21.

The testator himself put his grandson apprentice to an haberdasher, and paid 126 *l.* with him to his master, and a year afterwards made a codicil to his will, by which he gave some legacies. The question was, whether the 126 *l.* for apprenticing him was an ademption *pro tanto? The court was of opinion, as the* 1000 *l. was not given for this use alone, but for other purposes, and the codicil made after this sum had been so laid out, it was a confirmation of the legacy, and amounted to a republication of the will, and decreed the whole* 1000 *l. to the grandson.*

ROOME v. ROOME. "of his late son *James Roome* deceased; and that his executors "might pay or apply all or any part of the said thousand "pounds, and the interest or dividend thereof in the binding his "said grandson apprentice, or setting him up in the world, as "they in their discretion should think fit; and that so much "thereof as should not have been paid or applied as aforesaid, "he willed and directed should be by them paid and transferred "unto his said grandson at his age of twenty-one years; and in "case he should die under that age, that the same should be "equally divided among the plaintiffs *William* and *Thomas* "*Roome* and *Ann Barret*, the children of the testator, and "made these three persons executors."

The estate in *Islington* was a copyhold estate, but no surrender was made to the use of the will.

On the 2d of *November* 1742, the testator made a codicil to his will, whereby he gave legacies to three of his servants, which he had omitted in his will.

But after making his will, and before the codicil, namely on the 15th of *August* 1741, the testator put the defendant apprentice to one *Stanton* of *London*, haberdasher, and paid one hundred and twenty six pounds with him to his master.

The bill is brought that the want of surrender might be supplied, and that directions may be given by the court concerning placing out, on securities, such part of the 1000 *l.* given [182] for the defendant's benefit, as the court shall be of opinion he is intitled to.

The defendant (*Stephen Roome*, the grandson) insists that he is an heir at law totally disinherited, and therefore ought not to be obliged to surrender the copyhold estates to the plaintiffs, and that the court will not supply the want of it; and that as the testator lived above two years after paying the hundred and twenty six pounds for putting him apprentice, and made no alteration with respect to the thousand pounds, though he made a codicil upwards of a year after paying the hundred and twenty-six pounds, it was manifestly the intention of the grandfather that the same should not be deducted out of the thousand pounds, but the whole applied to the defendant's use: and being an infant, insists his right to the real estate ought to be saved.

The Master of the Rolls made two questions:

First, As to supplying the want of a surrender of the copyhold to the use of testator's will.

Secondly, Whether the payment of one hundred and twenty-six pounds by the testator in his life-time, is to be considered as an ademption *pro tanto* of the thousand pounds legacy to the defendant.

With regard to the first of these questions, the plaintiff's counsel insist, that though there is no surrender to the use of the will, yet if the lands devised are for payment of debts, or as a pro-

a provision for a wife or children, this court will supply the want of a surrender (1). Roome v. Roome.

To be sure, the general rule is so, though I do not remember it has been extended so far as a wife. (*Quære, for in Eq. Ca. Abr. title Copyhold, it appears to have been so extended; and in Hawkins* v. *Leigh, 29th of November* 1739, *before Lord Hardwicke.*) See *T. Atk.* 1 *vol.* 387.

It has been said by the defendant's counsel, that it ought not to be supplied in this case against him, because whenever an heir at law is disinherited, the rule is otherwise, and is certainly a true rule.

But then it will be a question, whether upon the circumstances of this case it ought to be supplied.

Mr. Attorney General says, that though an heir is barred of all the lands which he would have taken by descent, yet he shall not be said to be totally disinherited, provided he has a provision from his ancestor in any other way (2).

But I do not remember any such distinction, and always thought the rule meant an heir at law disinherited of real estate, (*Quære*, for the case of *Hawkins* v. *Leigh* was determined on this distinction by Lord Chancellor), however this point must be reserved, for I cannot make any binding decree now, as the heir at law is an infant, and therefore shall give liberty to apply to the court in respect to the copyhold estate when he comes of age (3). [183]

With regard to the second question, the doubt is, whether I can consistently with the intention of the testator decree the whole thousand pounds to the defendant.

A grandfather does not stand *in loco parentis*, and therefore not obliged to maintain a grandchild, nor can he appoint a testamentary guardian.

A grandfather to be sure is a very near relation, but strictly speaking does not stand *in loco parentis*; a father is indeed obliged to maintain his child, but a grandfather is not obliged to maintain a grandchild.

A father can appoint a testamentary guardian of his child, but a grandfather cannot.

The plaintiff's counsel insist, that as the thousand pounds was given to bind the defendant out apprentice, that the testator having afterwards done this himself, it is a partial ademption, and ought to be taken out of the portion: and they have compared this to the case of a person's giving *A.* a thousand pounds by will to build him a house; if the testator in his life-time lays out that sum upon a house for *A.* it is a satisfaction, and *A.* shall not have the thousand pounds under the will; and that as the defendant in the present case has had the thing intended, he shall not have the legacy.

(1) See *Smith* v. *Baker*, *ante* 1 *vol.* 385. *Hawkins* v. *Leigh*, *ante* 1 *vol.* 387, and notes thereto. *Going* v. *Nash*, *post.* 191.

(2) So held in *Chapman* v. *Gibson*, 3 *Bro. Cha. Rep.* 229. *Pike* v. *White*, 3 *Bro Cha. Rep.* 286.

(3) "And in the mean time the plaintiff *William Roome* to be quieted in the "possession of the said copyhold estates."

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But I think the present case differs from that which has been cited, because the thousand pounds is not given for the putting him out apprentice only, but for other purposes, maintenance, &c. neither are the executors obliged to expend such sums, as shall be necessary for apprenticing him, out of the thousand pounds, but they may do it out of the interest and produce of it.

The defendant besides might have chosen some other business, or perhaps none at all.

Ademptions are confined to such instances where a testator applies a sum of money to the same purpose for which he had before given the legacy.

Therefore those cases, wherein ademption has been allowed, must be confined to such instances where a testator gives a legacy for one particular purpose only, and after that applies a sum of money to the same purpose (1).

It appears too manifestly by one circumstance, the testator did not intend himself there should be any ademption of the thousand pounds, and that is the codicil (made above a year after the hundred and twenty-six pounds had been laid out for [184] apprenticing the defendant), which is a confirmation of the legacy, and amounts to a republication of the will.

If the testator had any intention of deducting the hundred and twenty-six pounds out of the thousand pounds, he had a fair opportunity of doing it when he was adding a codicil; and as he has not done it, it will be the greatest equity to decree the whole thousand pounds to the defendant, the grandson of the testator; and his Honour decreed it accordingly (2).

(1) Vide *Bellasis* v. *Uthwatt*, *ante*, 1 *vol.* 426, and the note to that case.

(2) *Reg. Lib. B.* 1744. *fol.* 307.

Case 56. *October* 19, 1744.

This court has a power to remove coroners where they misbehave, or live out of the county.

A Petition on behalf of the freeholders of *Warwick*, to remove *Saunders*, a coroner, for neglect of duty, &c. and for absconding.

LORD CHANCELLOR,

I have no doubt as to the authority of the great seal with regard to the removing of coroners, where they misbehave, or where they live out of the county; and the precedent of the order made for that purpose by Lord *King* is an authority, which was an application on behalf of the freeholders of the county of *Derby*, *August* 5, 1725.

The court will not order a writ to issue *de coronatore exonerando*, till there is an affidavit of service at the last place of his abode.

But, as there is no affidavit here of service on the defendant the coroner, but a suggestion only, that they are not able to come at him, I will direct the petition to stand over till the second *Wednesday* in the term, because, as it is an office of freehold, I will not order a writ to issue *de coronatore exonerando*, until there is an affidavit of service at the last place of his abode.

The

The authority of this court does not extend so far as to remove one coroner, and to appoint another, but the choice of a new one must be by a majority of freeholders.

Ex parte Barnsley, October 19, 1744, amongst the Lunatick Petitions. Case 57.

AN application to the court to traverse the *second* inquisition. S. C ante 168. After *B.* had been found a lunatick under two inquisitions, the court would not allow him to traverse the second.

The second inquisition finds that at the time of taking it he is of *unsound mind*, so that he is not sufficient for the government of himself, his manors, lands, messuages, goods and chattels, and that he hath been of such unsound mind from the 8th of *April* 1737.

LORD CHANCELLOR,

The case of *Roberts* (1) is distinguishable from this, he was found a lunatick of insane mind only by one inquisition; and there were also great objections as to the behaviour in finding that inquisition, which alone would have induced me to quash it. [185]

But in all these inquisitions, they are not at all conclusive; for they may bring actions at law, or a bill to set aside conveyances, so that it might have been disputed afterwards upon an issue to be directed: but Doctor *Finney* submitted there to be bound by the issue found on that traverse; and as I thought this would put an end to the affair, therefore I allowed it.

It has been said the parties have a right to traverse it on the statute of 2 *Ed.* 6. *ch.* 8. *sec.* 6. if so, there is no occasion to apply to me.

On a petition *ex parte Smith* in ideocy before Lord *King*, as the person was found to be an ideot, he thought it a hard case, and therefore would not grant the custody without giving leave to traverse the inquisition. Where an inquisition finds a person an ideot, the court, thinking it a hard case, gave leave to traverse it.

There was another reason which induced me to suspend the custody of Mr. *Roberts*'s estate, a great part of it lay in the *West Indies*, and if I had granted it, great injury might have been done by changing the managment of the estate, for it would have put an end to the authority of the attorney there, which is the method of managing estates in the colonies.

If the gentleman has a right by law, and under the statute to traverse, he may take that method.

But if after two inquisitions in this case, finding *Barnsley* a lunatick, (for the first was in substance good, though informal, and therefore set aside), I should allow the petitioner to traverse the inquisition, I should spin out proceedings in lunacy to a very great length and infinite expence, and should make them a very

(1) *Ante* 5. *post.* 308. S. C.

Ex parte BARNSLEY.

heavy burden upon the subject, and therefore I shall dismiss this petition.

If the case of Mr. *Roberts* is to be brought up as a precedent upon every turn, I do not know any one order, since I had the seals, that I should repent of so much as in that case, but there is a wide difference between the cases.

[186]

Case 58. *Goring* versus *Nash and Others*, *October* 22, 1744.

S. C. cited 1 Vef. 73. 513. The articles made previous to the marriage of Mr. *Fagg* decreed to be carried into execution for the benefit of the plaintiff his eldest sister.

THIS cause came before the court on a bill brought by Sir *Charles Goring* and his Lady, one of the daughters of Sir *Robert Fagg* the elder, to have a specific performance of articles entered into on the marriage of *Robert Fagg* the younger, and to have the lands specified in the articles settled to the use of Lady *Goring* in tail.

Sir *Robert Fagg* the father had one son and four daughters, namely the plaintiff and the three defendants; he had an estate amounting to 2800*l. per annum*, and on the marriage of his son, *October* 22, 1729, entered into articles between him and his son, by which there was an agreement to settle the greatest part of the estate, (eight hundred pounds a year excepted.)

By these articles the father and son covenanted for themselves, their heirs, executors, &c. to settle these lands to the following uses.

As to one part of the value of 820 *l. per annum*, to Mr. *Robert Fagg* for life, and after the determination of that estate to raise a jointure of 400*l.* a year rent-charge, for the wife, and then to trustees to preserve contingent remainders to sons in tail male, afterwards to sons by another marriage, and there is no other limitation.

Then the articles take up the consideration of another part of the estate, and the uses of this are limited to (1) the same persons as in the first mentioned lands, with a charge by way of additional portion of 4000*l.* for Sir *Robert Fagg*'s daughters: and after several limitations, then came the limitation in question to the plaintiff Lady *Goring*, and her heirs male unless Sir *Robert Fagg* should appoint other uses under his hand and seal; then a limitation to the other daughters in tail, then to Mr. *Fagg* of *Grimsby*, then to Sir *Robert*'s right heirs.

Sir *Robert Fagg* the father died in 1736, the son survived.

After the father's death the son directed a draft to be prepared to carry the articles into execution, but died before it was finished (2).

The legal estate in some of the lands has descended on the four sisters in fee, as heirs both of the father and brother.

(1) "Sir *Robert Fagg* the father, for "life, remainder to *Robert Fagg*, the "son for life, remainder to his issue, &c."

(2) "Without issue."

A bill

A bill has been brought by Lady *Goring* to have the articles carried into execution, and to have the intail of the estate, so limited to her as aforesaid, settled accordingly. GORING v. NASH.

LORD CHANCELLOR,

I gave orders on the 8th of *November* 1742, that the Master should inquire what were the value of the estates comprised in the articles, and what estates were descended. [187]

The Master has made his report, and the cause stands for further directions.

The estates are of three kinds.

First, Lands comprised in the marriage articles, in which the uses are carried no further than before mentioned, in value 820 *l. per annum.*

Secondly, The estates in the articles, which are claimed as limited to the plaintiff in tail, the Master has divided into two kinds; one of which it is stated, he cannot determine, whether it is limited or not; and the other, to be clearly limited, amounting to 564 *l.* 6 *s.* 8 *d. per annum.*

Thirdly, Lands which are unquestionably descended, both in law and equity, amounting to 804 *l.* 14 *s. per ann.*

Upon this case, the question is, Whether the plaintiff, Lady *Goring*, is, under these articles, intitled in a court of equity to have them carried specifically into execution.

The specific execution of articles being the most adequate justice in general, the court will not leave it to an action at law.

Now, the power of the court to carry articles into execution has not been doubted on either side; for the specific execution of articles being the most adequate justice in general, shall not be left to an action at law.

But, notwithstanding this, the defendant's counsel have taken three objections, on which they have principally relied.

Though discretionary in the court whether they will decree a specific execution, yet it is so on certain grounds, and not arbitrary, but governed by rules of equity.

First, That the rule has several exceptions; and that it is discretionary in the court, whether they will decree a specific execution upon the circumstances of the case.

Secondly, That the plaintiff is plainly a volunteer, and not within the valuable consideration of these articles.

Thirdly, That great hardships would follow from such a decree, for that the defendants would in a manner be disinherited by it.

As to the *first*, it must be admitted; but then it ought to be understood in this manner, that it is discretionary on certain grounds, and not arbitrary, but governed by rules of equity. [188]

The *second* objection, and what has been principally relied upon, is, That the marriage between Mr. *Robert Fagg* and Mrs. *Sarah Ward*, was the sole object, and that the present plaintiff is only a daughter of Sir *Robert Fagg*'s, and not the eldest; and besides, no party contracting in the marriage articles, unless presumptions are taken in to help it out.

This point has been clearly and fully argued, and the case of *Jenkins* v. *Keymiss*, reported in 1 *Lev.* 150, 237, 238. and in 1 *Chan. Cas.* 103. has been mooted chiefly on both sides: and it has been insisted, that the plaintiff is not such a person as is intitled

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tled to have the articles carried into execution, or who could prevail againſt a ſubſequent purchaſer, which was the caſe of *Jenkins* v. *Keymiſh*.

In a queſtion between relations in the ſame degree, the rule that governs the court in theſe caſes is, whether it would be attended with hardſhips, or not; or whether a ſuperior or inferior equity ariſes on the part of the perſon who comes for a ſpecific performance.

The ſtrict meaſure which governs the court in a queſtion between perſons who come to carry articles into execution, and purchaſers, is not the rule of this court, for between families, the court have conſidered, whether it would be attended with hardſhips or not, or whether a ſuperior or inferior equity ariſes on the part of the perſon who comes for a ſpecific performance, and this was the ground Lord *Cowper* went upon in the caſe of *Finch* v. *Lord Winchelſea*, 1 *P. Wms*. 277.

Lord *Harcourt* had decreed the agreement between the old Counteſs of *Winchelſea* and the late Earl; and Lord *Harcourt*'s decree was affirmed in the Houſe of Lords.

The Earl of *Winchelſea*, after the agreement, confeſſed a judgment for juſt debts: when Lord *Cowper* had the ſeals a ſecond time, another bill was brought by judgment creditors, to be ſatisfied out of that eſtate: He decreed for the judgment creditors; for though it was a ſufficient agreement to bind the ſeveral branches of the family, yet not adequate to bind creditors.

I mention this, to ſhew, that the diſtinction has been already taken, and that it is one conſideration how far the court will ſupport agreements of this kind againſt relations in a family, and againſt purchaſers and creditors (1).

Lord Keeper *Wright*'s reaſoning in *Watts* v. *Bullas*, was too large owing to his being then new in the court, and purſuing the maxims of law too far as to the conſideration of blood to raiſe an uſe.

In the caſe of *Watts* verſus *Bullas*, 1 *P. Wms*. 60. before Lord Keeper *Wright*, his reaſoning was too large, owing to his

(1) The following diſtinctions ſeem to be the reſult of the ſeveral determinations on this ſubject. In caſes of *actual ſettlements* before marriage, the rule is, that the conſideration of the marriage will not only ſupport the limitations to the immediate objects of the marriage, ſuch as the huſband and wife and their iſſue, but alſo all ſubſequent remainders, which are not directly within the contract or conſideration of ſuch marriage, and that even againſt purchaſers or creditors. *Jenkins* v. *Keymiſh*, 1 *Lev*. 150. 237. 1 *Cha. Ca*. 103. 1 *Cha. Rep*. 275. *Hamerton* v. *Milton*, 2 *Wilſ*. 356. *Newſtead* v. *Searle*, ante 1 vol. 265. *Edwards* v. *Counteſs of Warwick*, 2 *P. W*. 175. *Ithel* v. *Beane*, 1 *Veſ*. 216. I mention the above rule as applying to *actual ſettlements*; but in the caſe of *articles* before marriage to ſettle lands, or to inveſt monies in the purchaſe of lands, whereby the perſons in remainder are obliged to ſeek the aſſiſtance of a court of equity, there it ſeems clear from the words of Lord *Hardwicke* in the above caſe of *Goring* v. *Naſh*, and thoſe of Lord *King* in *Vernon* v. *Vernon*, 2 *P. W*. 600, that the rule will not apply as againſt *purchaſers* or *creditors*. See alſo *Finch* v. *Earl of Winchelſea*, 1 *P. W*. 277. *Warwick* v. *Warwick*, *poſt*. 291, 293, and note. However even in the caſe of articles the rule is ſtill applicable, where the conteſt lies between relations in the ſame family or mere volunteers. *Kettleby* v. *Atwood*, 1 *Vern*. 298. 471. *Lancy* v. *Fairchild*, 2 *Vern*. 101. *Vernon* v. *Vernon*, 2 *P. W*. 594. *Goring* v. *Naſh*, *ſupra*. *Stephens* v. *Trueman*, 1 *Veſ*. 73. *Hart* v. *Middlehurſt*, *poſt*. 371.

being then new in the court, and pursuing the maxims of law too far, as to the consideration of blood to raise an use, for that would carry it to the remotest blood that could raise an use in law, and which this court does not regard; there the court made a decree for supplying a conveyance in favour of a half brother against an heir at law.

There was a case before me of *Newstad* versus *Searle*, *March* 2, 1737. 1 *T. Atkyns* 265. I only mention it, as the bar took notice of it, but not as any authority.

On this head of *consideration*, and how far the court have supported agreements where the person who comes for a specific execution is not within the consideration of the articles, I will mention a case for the sake of the reasoning only. *Holt* versus *Holt*, 2 *P. Wms.* 648.

In the present case, it is unnecessary to take up time in citing particular cases, because I apprehend all the cases are authorities for what I shall now decree.

All the decrees for specific performance of marriage articles on limitations for younger children, are authorities in favour of the plaintiff, and where such articles have been decreed at all, they have been carried into execution, even as to collaterals, and not carried into execution in part only.

A specific performance of marriage articles has been decreed in this court even as to collaterals.

Suppose, in the present case, a bill had been brought by Mr. *Robert Fagg* the son, or the widow, must not this particular limitation have been decreed to the plaintiff at the same time?

I shall, in making my decree, rely on these grounds.

First, That the plaintiff is clearly intitled to a specific performance of part in these articles.

Secondly, That the trustees would be clearly intitled to recover the whole value of the estate at law, out of the real assets.

Thirdly, That this limitation is part of the provision made by a father for a daughter.

As to the *first*, I go upon two reasons: That the plaintiff is intitled to be relieved against Lady *Fagg*'s demand of dower, and can compel her to be bound by her agreement as to her jointure; but if any cavils were to be raised on the nature of this decree, whether it should be by injunction to restrain her proceeding at law; yet without controversy she is clearly intitled to a decree for raising of 4000 *l.* as an additional portion for her, out of the 8000 *l.* charged upon the lands comprised in the marriage articles. [190]

Now, there is no instance of decreeing a partial performance of articles, the court must decree all, or none; and where some parts have appeared very unreasonable, the court have said, we will not do that, and therefore, as we must decree all or none, the bill has been dismissed.

The court will not decree a partial performance of articles; but where some parts appear unreasonable, they always dismiss the bill.

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In cafes of fraud or miftake, the court goes upon another ground, and relieves againft the fettlement itfelf.

Inftances have been mentioned of fraud or miftake in marriage agreements, but courts will relieve there, by ftriking out the miftake, or fetting afide the fraud, and therefore, in thofe cafes, they go altogether upon another ground, and relieve againft the fettlement itfelf.

No body can tell what it is that parties who are dead have laid the greateft weight upon, in coming to agreements, and therefore it would be attended with bad confequences if agreements were to be fplit, and one part to be decreed but not another.

In limitations of articles in *Wales*, where they make the eldeft daughter in the nature of an eldeft fon, though fhe is but part of an heir, yet the court will carry it into execution.

I mention this only as exemplifying what I have faid with regard to the confufion it would make, if the court decreed thefe agreements to be carried into execution in part only.

An objection was made, that Sir *Robert Fagg* might have executed the power of revocation, as well upon the foot of thefe articles, as if they had been carried into ftrict fettlement.

But he did not execute that power, which is a full anfwer.

The *fecond* fpecial ground is, that the truftees would be clearly intitled to the whole value of the land out of the real affets.

If an action had been brought againft the fon by the truftees, they muft have recovered the whole value againft him, who having no power of revocation, the jury could not take it in confideration in damages.

This brings it near the cafe of *Vernon* verfus *Vernon* (1), before Lord Chancellor *King*, 1731, for Mr. *Vernon* was as much a volunteer, and was a more remote relation than the plaintiff.

[191] In this cafe, if the truftees had recovered in an action at law out of the real affets of the brother, the defendants might come into this court for the fpecific lands, or to have he affets laid out in the purchafe of lands.

Now this would be fuch a circuity as ought not to be allowed in equity, as it would be more adequate juftice to decree it immediately.

One objection made on the part of the defendants was, that here was a remainder in tail limited to Mr. *Robert Fagg* the fon, before this limitation to the plaintiffs, and that he might have barred the plaintiff by recovery.

There is no doubt he might, but, as he hath not done it, it is no objection, and was the very cafe in *Vernon* and *Vernon*, and the fame argument made ufe of there (2); and as in this cafe he has done no act; nay, ftronger, has rather done an act which imports an intention to carry the articles into execution, by ordering a *draft* to be prepared for that purpofe, it anfwers this objection.

(1) 2 *P. W.* 594. S. C. (2) Vide *etiam Ramfden* v. *Hylton*, 2 *Vef.* 310.

The

The *third* ground is, that this is part of a provision for younger children, which is always favoured here, and carried into execution. GORING v. NASH.

That they are considered as purchasers, by reason of the natural obligation of parents to provide for their children, and this court will supply for their benefit the surrender of copyhold estates (1), &c. and one objection has been made, which deserves an answer, that this is not within the common provisions for a daughter after several limitations.

As to that, I am of opinion, that the father is a judge of the *quantum* of a provision, and likewise of the time when it shall take place.

A father a judge of the *quantum*, and also of the time when the provision for a daughter shall take place.

Limitations to them have been to arise frequently on failure of issue male of an eldest son or sons, and yet in this court have been considered as a provision, and the time makes no difference.

Limitation to a daughter on failure of issue male of an eldest son, or sons, is considered as a provision, and not too remote.

Suppose the father seised of copyhold lands, should limit them to a first son in tail, and a second son, and a third, fourth, and fifth son, and there is no surrender, and the second son *brings a bill, who is to take in possession to have it supplied; will not the court decree it for the third, fourth, and fifth sons as well as the second, considering it as intended for a provision, and in the same order the father has left it?

A father limits a copyhold estate to a first son in tail, and to a second, third, fourth, and fifth son, and there is no surrender; the second brings a bill to have it supplied; the court will decree it for the third, fourth, and fifth son, in the same order in which the father has left it.

A general objection has been made of hardship, as to the other three sisters, and I own, I thought it a hard case, and for this reason, I sent it to a Master to state the value; and there is clearly an estate of sixteen hundred and twenty-five pounds a year descended, but an incumbrance of 23,000 *l.* upon it; however, as it is an old estate, it will sell for 40,000 *l.* and doubtful, besides, on the Master's report, whether another estate may not descend, but, if it should not, they are amply provided for. [*192]

Therefore it stands distinguished from the case of *Parry* versus *Hughes*, in 1731, in the court of Exchequer, for there it must have been carried into execution for a total stranger.

The court has always decreed the provision made by a parent for a child, to be as extensive as the parent intended it, where it does not introduce a hardship, or leave the other children in distress, for a father may have a good reason to prefer

Where it does not introduce hardship or leave the other children in distress, the court always decree the provision made by a parent for one child to be as extensive as he intended it.

(1) Vide *Roome* v. *Roome*, ante 182. *Pike* v. *White*, 3 *Bro. Cha. Rep.* 286.

one

Oring v. Nash. one child to another; whether he had in this case I shall not inquire.

His Lordship decreed the articles in 1729 to be carried into execution for the benefit of the plaintiff (1).

(1) *Reg. Lib. A.* 1743. fol. 666.

Case 59. *King* versus *Marissal*, *October* 31, 1744.

S. C. post 200. ante 2 vol. 603. in note.

Before execution on a judgment obtained against *D.* on an action upon a promise of marriage, he by mortgage conveys his whole effects to the defendant; the court would carry it no further than to allow the plaintiff to redeem the defendant.

THE plaintiff was drawn in, by a promise of marriage, to suffer one *Dupin* to lie with her; he afterwards marries another woman.

She brings an action against him, and recovers 2000 *l.* in damages; *Dupin*, in order to defeat the verdict, conveys his whole effects, by way of mortgage, to the defendant, before execution on the judgment (1).

The bill is to set aside the conveyance as fraudulent.

The defendant admits the verdict in *June* 1741, and that the conveyance to him, though dated on the 29th of *September* following, was not executed till the 14th of *October*.

Dupin himself is gone to *Holland*.

[193] Mr. Solicitor General, counsel for the plaintiff, laid a stress upon its being dated a very little time before execution was taken out, which is a circumstance to shew the fraud.

He cited 2 *Vern.* 616. *Crane* versus *Drake and others*; and *Neavgent* versus *Giffard*, *November* 13, 1738, before Lord *Hardwicke*, 1 *Tr. Atk.* 463.

The defendant's answer was only as to his belief with what view *Dupin* executed this deed.

LORD CHANCELLOR,

If you wanted an answer to this part, you should have interrogated him more particularly; I am clearly of opinion the plaintiff can carry it no further than to redeem the defendant; and his Lordship decreed accordingly (2).

(1) The lands comprized in this mortgage were *leasehold*. The verdict was obtained in *Trin.* Term 1741, and judgment entered the *Mich.* Term following: execution was sued out, and the sheriff made an assignment of the premises, in trust for the plaintiff, who by her bill prayed, that in case any thing was really due to *Marissal* on his mortgage, she might be permitted to redeem.

(2) *Reg. Lib. A.* 1744. fol. 91. Vide *Shirley* v. *Watts*, *post* 290.

Walsh versus *Peterson*, *November* 6, 1744. Case 60.

A Question in this case arose upon the following will and codicil.

P. gives two thirds of his real estate to his son, to hold to him, his heirs and assigns, for ever; but in case he dies before he shall attain the age of 21, or without issue, then to the testator's wife, her heirs and assigns: the son died after 21, without issue. *Lord Hardwicke held it to be a vested estate in fee in the son, as he attained 21, and though he died without issue, that it did not go over to the mother, but descended on his heir at law* (1).

" As to such real estate as I shall die seised and possessed of, " I give and devise one full equal third part thereof unto my " wife *Martha Peterson*, to hold to her, her heirs and assigns for " ever; *and the other two thirds of all my real estate I give and* " *devise to my loving son Matthew Peterson, to hold to him, his* " *heirs and assigns for ever*; but my mind and will is, *in case* " *said son shall happen to die before he shall attain the age of* 21 *years*, " *or without issue, then I do hereby give and devise the said two* " *thirds of my said estate to my said wife* Martha Peterson, *her heirs* " *and assigns*."

By the codicil, the testator recites this clause; and then proceeds thus:

" Now my further mind and will is, and I do hereby will " and require the same, *that in case my said son shall happen to* " *die before the age of* 21, *or without issue as aforesaid, and also* " *in case of the decease of my said wife*, that then I do give and " devise the said *two third parts* of my said real estate unto and " amongst all and every the sons and daughters of my brother-in-" law *Thomas Dickenson*." [194]

The son died after the age of 21, but without issue; and the question was, Whether the devise over to the mother shall take effect upon one of the contingencies happening only.

Mr. Solicitor General, for the defendant, the mother, said, this was a contingency with a double aspect, and cited the case of *Bellasis* versus *Uthwatt*, before Lord *Hardwicke*, 1 *Tr. Atk*. 426.

That reciting the will properly, and deliberately altering it in the codicil, is so strong in her favour, that the court will not easily pass it over, or incline to turn a disjunctive into a conjunctive.

(1) In the above case the word *or* was construed to be a *copulative*. There are several cases, wherein this point has come in question, and which have received the same construction. *Sowell* v. *Garrett*, *Moor*, 422. *Cro. Eliz*. 525. S. C. *Price* v. *Hunt*, *Pollex*. 645. *Barker* v. *Suretees*, 2 *Stra*. 1175. *Frammingham* v. *Brand*, *post* 390. 1 *Wils*. 140. S. C. 2 *Ves*. 249. *Wright dem. Burrill* v. *Kemp*, 3 *Term Rep*. 470. The reader is also referred to the cases cited in the note to *Read* v. *Snell*, *ante* 2 vol. 645.

There

Walsh v. Peterson.

There was a case before the council board, in which the two chiefs assisted, and have not yet agreed as to the construction of the word *or*.

Lord Chancellor,

I think it a very plain case; the testator had a wife and a son living, if he had gone no further than the first clause, he had given him an absolute fee, but then follows the executory part.

Upon the words in the codicil, there can be no doubt at all; it is to go over upon two contingencies; the words *as aforesaid* take in all the former disposition.

Suppose he had said no more, than in case my son had died under, 21 *as aforesaid*, would this have disinherited the issue, if the father had died under 21, and gone over to the mother? By no means; for I would have supplied the words, and without issue, and should have been justified by the expression, *as aforesaid*.

The case of *Soulle* versus *Gerrard*, in *Cro. Eliz.* 525. and *Moore* 422. was determined on this very point, "a devise to "his son, and if he die without issue, or before his age of "21 years, that it shall remain to another; the son hath issue, "but dies before 21 years, yet it was adjudged, that his issue "shall have the land, and not the remainder-man; and *or* "there was construed for *and*; so stated in *Moore*, but called "*Sowell* versus *Garret*: if the construction had been otherwise, "the grandson of the testator would have been disinherited if

[195] "the son had died before 21."

His Lordship held it to be a vested estate in fee in the son, as he arrived at his age of 21; and that though he died without issue, yet it did not go over to the mother, but descended on his heir at law.

Case 61.

Pringle versus *Hartley*, *November* 15, 1744.

The ship *Success* being insured from *London* to *Carolina* was taken by a *Spanish* privateer, and afterwards retaken by an *English* one, and carried to *Boston*, where, no person appearing to give security, she was condemned, and sold in the court of admiralty there; and, after the re-captors had their moiety, the overplus remained with the officers of that cour. The defendant brought an action on the policy, and had a verdict; the plaintiff, by his bill, prays an injunction, insisting the defendant ought to recover no more on the policy than a moiety of the loss. *The court denied the injunction, for as the defendant had offered to relinquish the salvage, he was intitled to recover the whole money insured.*

THE defendant insured the ship *Success* from *London* to *Bermudas*, and so to *Carolina*; the ship was taken by a *Spanish* privateer, and afterwards retaken by an *English* privateer, and carried into *Boston* in *New England*, where, no person appearing to give security, or to answer the moiety *the re-captors* were intitled to, she was condemned, and sold in the court of admiralty there; *the re-captors* had their moiety, and the overplus money remained in the hands of *the officers of that court*.

An action was brought by the defendant, upon the *policy*, who had a verdict.

The plaintiff brought a bill, suggesting the capture to be fraudulent, and done designedly by the captain; and moved now for an injunction to stay the proceedings at law. PRINGLE v. HARTLEY.

The counsel for the plaintiff argued, that though the capture might not be fraudulent, yet the defendant ought not to recover more on the policy than a moiety of the loss, as the act of 13 *Geo.* 2. *c.* 4. *f.* 18. gives the salvage to the owner, and he is intitled to receive it from the officers of the admiralty, and that the plaintiff ought to be obliged to pay no more than the loss he has actually sustained, which cannot be ascertained till after the defendant shall have received what might have come upon the salvage.

The defendant, in his answer, had sworn he had offered, and was now willing to relinquish, his interest to them in the benefit of the salvage, and would give them a letter of attorney for that purpose to receive it.

LORD CHANCELLOR,

There is no ground for an injunction in this case; here there was an agreement to go to trial in one of these actions which had been brought, and to be bound by the event of that, at the time of the trial they knew the ship *was re-taken*, and the manner of the capture. [196]

The *quantum* of the damage and loss sustained, is the only thing now to be disputed; for it is impossible to carry on trade without *insuring*, especially in the time of war.

Therefore regard must be had to the *insured*, as well as the *insurer*; and where there is no admission in the answer, of any kind of fraud, though various pretences of that sort may be set up by the bill, they are not to be regarded.

The question then arises on the statute of 13 *Geo.* 2. with regard to the salvage.

It has been said, there ought to be only half the loss recovered on the policy: and as to that, the act has made great alteration in the laws of nations with regard to *re-captures*.

The carrying a ship *infra præsidium hostium*, or *si pernoctaverit* with the enemy, makes it the prize of the person *retaking* it, as if it had been originally the ship of the enemy; but by the act, *the re-caption* is the revesting of the property of the owner.

By 13 *Geo.* 2. the recaption of a ship is the revesting of the owner's property.

But where insurances are *interest, or no interest*, I am doubtful whether the act can operate or not.

When insurances are interest or no interest, doubtful whether the act can operate.

This is an insurance *according as interest shall appear*.

If there is a salvage, that must be deducted out of the money recovered by the policy; but if none has come to the hands of the plaintiff in the action, the jury cannot take notice of it.

Salvage must be deducted out of the money recovered by the policy, if come to the hands of the insured.

The ship was condemned and sold, because the moiety was not paid, or secured to be paid by the owners.

PRINGLE v. HARTLEY.

It is uncertain whether the defendant will receive any thing or not; and if any thing is recovered, he must have an allowance for his expences in recovering.

Therefore I take it, when he is willing to relinquish his interest in the salvage, he ought to recover the whole money insured.

It would be mischievous if it was otherwise, for then upon a *re-capture* a man would be in a worse situation than if the ship was totally lost (1).

(1) Decreed, that the defendant should assign all his right in the ship *Success*, and the benefit of the decree made in the *Admiralty Court*; and upon such assignment, the plaintiff's bill to be dismissed. *Reg. Lib. B.* 1744. fol. 83.

[197]
Case 62.

Colegrave versus *Juson*, *November* 17, 1744. *Rehearings.*

A bill for tithe in kind, a composition set up of a quarter of rye and one of oats in lieu; a trial at law directed, and a verdict for the modus. The plaintiff insisted on a new trial upon the discovery of an old deed in the chapter-house at *Westminster*, which he set up as a decree of the Pope's delegate, that *the revenues* of the church which had been alienated should be restored, and would have it understood that the tithes were comprehended under the word *revenues*. *The court of opinion this paper was not a foundation to grant a new trial, and refused to do it.*

THE plaintiff brought his bill for tithe of grain in kind; the defendant insisted upon a composition of one quarter of rye and one of oats in lieu of it. A trial at law was directed, and a verdict found for the modus.

The plaintiff insists now upon a new trial on a discovery of an old deed in the chapter house at *Westminster*, which he called the record of a cause determined before the Pope's delegate, in which it was decreed that revenues which had been alienated should be restored to this church, and concludes that the tithes were comprehended under the word *revenues*; the Judge at the trial refused to admit it as evidence.

LORD CHANCELLOR,

There is no foundation to grant a new trial, for if I should, it would be a precedent to overturn the rights of men upon very uncertain grounds.

I am afraid this is a case where *Prowling* in an an office has spirited up the rector to dispute *this modus*; it happens very unfortunately for such persons that they stumble upon papers which they fancy are evidence of *tithes in kind*.

This is nothing more than a proceeding in some ecclesiastical court, what *non constat* found: First, in the receipt of the Exchequer, and transmitted from thence to the chapter of *Westminster*.

The receipt of the Exchequer is no office of record, except in matters relating to the King's revenue.

The Receipt of the Exchequer is no office of record for things of this kind, but only in matters relating to the King's revenue.

The

COLEGRAVE v. JUXON.

The officer has taken upon him to put a title to it, which he had no authority to do, and which the paper does not warrant.

In it's utmoſt force it is a proceeding in an eccleſiaſtical court, concluding with an extrajudicial ſentence by the Pope's delegate.

*No proceedings in the eccleſiaſtical courts in this kingdom are records, they are only evidence of ſentences in their courts, therefore I mention this that the officers there may not take upon them to intitle them *recorda Domini Regis Georg. &c.* for the future.

The officers of the eccleſiaſtical courts ſhould not intitle their proceedings *recorda Domini Regis Georg. &c.* for they are only evidence of ſentences in their courts.

[*198]

I am of opinion it is not ſuch an inſtrument, that if the original had been produced, it would have been given in evidence.

Conſider what the juriſdiction was that the Pope exerciſed before the reformation, and though uſurped, yet it muſt have it's weight.

The Pope before the reformation, exerciſed a juriſdiction either by way of *avocation*, or by requeſt from an inferior court.

He might exerciſe it by way of *avocation*, or by requeſt from an inferior court.

The *legate a latere*, whilſt in the kingdom (1), did exerciſe a legantine authority without an appeal to the Pope, as for inſtance *cardinal Campejus*.

The legate *a latere* exerciſed an authority without an appeal to the Pope.

Neither the time nor the court does appear in this paper, and another inſtrument has been tacked to the parchment by a modern ſtring, but does not at all relate to the firſt paper.

Conſider what is the Pope's commiſſion to the archdeacon of *Leiceſter*, whom he made his delegate: the Pope does not take notice by what way the cauſe came before him, whether by appeal or by avocation, or by letter of requeſt.

So that here is no recital of any cauſe depending before him in any ſhape, only that there had been alienations of the revenues of the church, and that the alienees had obtained confirmations from the Popes themſelves.

This was a kind of general inquiſition only, how far the poſſeſſion of this rectory had been alienated.

The two inſtruments by which they would ſhew it to be a cauſe, have no relation to one another, but tacked together in modern times.

Though an uſurped authority, it was allowed by law at that time, and muſt have it's conſideration: yet as it does not appear by this parchment there was any cauſe depending before the Pope, it can be of no ſignification, and, even if it had it's utmoſt force, would be of no advantage to the rector againſt a compoſition.

(1) *Vide Carte v. Ball, poſt.* 500.

COLEGRAVE v. JUSON.

I am clearly of opinion this was no sort of evidence, and was very properly rejected by the Judge who tried the cause.

There is the strongest evidence of a modus in this case, and no pretence that tithes were ever paid in kind, except this paper, and therefore there is no foundation for a new trial.

Case 63. *Stirling* versus *Lydiard*, *November* 21, 1744.

L. gives all and singular his leasehold estate, goods, chattels and personal estate whatsoever, to his daughter, and if she dies without issue living, then to the defendant. *L.* after making his will renews a lease with the dean and chapter of *Windsor*; this is no revocation, but the leasehold estate passed by the will (1).

THE question in this case arose upon Mr. *Lydiard*'s will, who devised in the following manner:

As to *all and singular my leasehold estate*, goods, chattels and personal estate whatsoever, I give to my daughter *Johanna*, and if she dies without issue living, then limits it over in the same manner to the defendant.

In the residuary clause testator repeats the words all and singular, &c.

He after making his will renews a lease with *the dean and chapter of Windsor*.

Johanna is dead without issue, and her husband as administrator and representative of his wife brings his bill to have the lease, insisting that the renewal by testator after making the will is a revocation, and that consequently he in the right of his wife is intitled to it.

LORD CHANCELLOR,

There is no doubt but *the leasehold estate* passed by the will.

The plaintiff goes upon a mistake, that this is a specific legacy: it is nothing like it, for it is only an enumeration of the several particulars of his personal estate, but yet is a general devise of the whole.

The court never strains to make a revocation.

But notwithstanding, if in point of law it is a revocation, it must have its effect here likewise.

But there is no foundation to say, what testator has done in this case is a revocation.

[200] Suppose the testator had purchased a new lease, would not that have passed? Why then should not a new term in a lease equally pass?

If I was to construe this a revocation, I do not know but if a man was to give all his Bank, *East India*, and *South-sea* stock, and should afterwards turn it into money, it might as well be insisted this was a revocation (2).

His Lordship declared there was no pretence for the plaintiff's demand, and therefore dismissed the bill.

(1) *Vide Carte* v. *Carte*, *ante* 174, and the note thereto.

(2) *Abney* v. *Miller*, *ante* 2 vol. 599. *Purse* v. *Snaplin*, *ante* 1 vol. 414. note.

Shirley versus *Watts*, *November* 23, 1744, *before the Master of the Rolls.* Case 64.

A Judgment creditor, who has not taken out execution, brings a bill against the defendant to redeem him, who is a mortgagee of the leasehold estate, and likewise a bond creditor.

A judgment creditor, before he is intitled to redeem a mortgage of a leasehold estate and bond creditor, must take out execution.

Master of the Rolls (*William Fortescue*, Esq;) The case of *Angel* versus *Draper*, in 1 *Vern.* 399. is in point, and a stronger one than the present, for there the defendant who had the goods in his hands seemed to have come to the possession of them in a fraudulent manner: but notwithstanding upon defendant's demurring, because the plaintiff (a judgment creditor) had not alledged he had taken out execution, the court allowed the demurrer, and said the plaintiff ought actually to have sued out execution before he had brought his bill.

In the present case there is not the least suggestion of fraud, the defendant being a fair and *bona fide* creditor by mortgage.

There was a case of *King* v. *Marissall* last term (1), upon a bill by a judgment creditor to redeem, which came on before Lord *Hardwicke*, when he asked for the writ of execution; and upon its being produced, admitted the judgment creditor for this reason to redeem.

For want of it's being taken out now, the bill must be dismissed, because till execution the plaintiff has no *lien* on the leasehold estate, and decreed accordingly.

(1) *Ante* 192. S. C.

Bridgman versus *Dove*, *November* 27, 1744. Case 65.

[201]

A Person by her will says, " (1) I devise to Sir *John Bridgman*, my heir, *Clifton* lands, he paying all debts " and legacies, charged on these lands, and after his decease " to my nephew *Bridgman*, doctor of divinity."

A. devises to Sir *J. B.* her heir, *Clifton* lands, he paying all debts and legacies charged on these lands, and, after his decease, to a nephew; Sir *J. B.* as tenant for life, is obliged to keep down the interest, if the principal is not discharged; but if it is, he is to pay one third, and the reversioner two thirds.

(1) " I declare Sir *J. Bridgman* my ' heir of *Clifton* lands, he paying all such ' legacies as I shall charge on these ' lands, after his decease to my nephew ' *Roger Bridgman* doctor of divinity, in ' tail," with remainders over to other persons. By a codicil in 1740, the testatrix gave an annuity to be paid out of the *Clifton* estate by Sir *J. Bridgman*, *if he survived her*; and if not, *then by her nephew Roger Bridgman.*

BRIDGMAN v. DOVE.

In another part of her will she says, "I leave my jewels, "plate, pictures, *medals*, *furniture*, to my two executors, to "be equally divided."

In the last clause of the will she says, "Creating *St. Mary*'s "and Creating *St. Olave*'s, *I make liable to all debts I have contracted* since 1735, notes or bonds, if any, and what remains "to be paid to *Mary Dove*, spinster, after the Creatings are "sold."

LORD CHANCELLOR,

A principal question is, Whether the debts and legacies should be paid out of Sir *John Bridgman*'s estate for life.

Notwithstanding the inaccuracy of the will, which is drawn by herself, her intention appears to me to charge the legacies upon *the Clifton lands*, but not so as to exhaust all the profits of the estate for life.

What colour is there to say, that this creates a condition on Sir *John Bridgman*, that he shall take nothing but upon paying.

Indeed it would be a strange thing to give an estate for life to a person of 70 years of age, on condition to pay legacies of 2600 *l.* out of an estate of 600 *l. per annum*.

By the latter words, there is a plain charge in the will upon these lands, and therefore Sir *John Bridgman*, as tenant for life, is obliged only to keep down the interest, if the principal is not discharged (1); but if discharged, to pay one third thereof, and the reversioner the other two thirds (2).

The next question is relating to the personal estate.

Provisions in wills for payment of debts relate to the time of the testator's death.

In all clauses with respect to provisions for payment of debts, they relate to the time of the death of the testator, in order to make a more honest and faithful provision for payment of debts.

The words all the debts which I have contracted, must be construed *shall* contract.

* If it had been all debts *that I owe*, still it would be extended to the time of her death: the words here are, *which I have contracted*, *have* contracted must be construed *shall* contract.

Personal estate is liable to pay the debts, unless there is a special exemption of it.

[*202]

I know of no authority where the words, I make my real estate liable to pay my debts, will exempt the personal estate without any special exemption of personal estate (3): nor has the court ever said, that personal estate shall be applied only to pay legacies, and not the debts.

(1) *Vide Partridge* v. *Pawlet*, *ante* 1 vol. 467.

(2) His Lordship decreed, that the legacies were a *general* charge upon the *Clifton* estate to be raised by sale or mortgage: that the plaintiff Sir *J. Bridgman* should keep down the *interest* of so much of the said legacies, *as should not be satisfied by the personal estate*; that the *principal* should be raised by sale or mortgage; and in case the same should be raised by *mortgage*, then the plaintiff Sir *J. Bridgman* should keep down the interest during his life; but if by *sale*, then the surplus monies, after payment of the said legacies, should be invested in the purchase of lands to be settled to the uses in the will. *Reg. Lib A.* 1744. fol. 146. *Vide Rowell* v. *Walley*, 1 *Cha. Rep.* 221. *Ballet* v. *Sprenger*, *Prec. Cha.* 62. *Verney* v. *Verney*, 1 *Ves.* 428.

(3) See *Gaton* v. *Hancock*, *ante* 2 vol. 439. note. *Walker* v. *Jackson*, *ibid.* 625. note.

Nor

Nor will making a particular eſtate in land liable to pay debts exonerate the perſonal eſtate, becauſe it is the natural fund for payment of debts. BRIDGMAN v. DOVE.

Suppoſe a man deviſes a real eſtate liable to the payment of debts, and, ſubject to thoſe debts, gives it over to another, or what remains after payment of debts, which is all one; if there are not expreſs words to exempt the perſonal eſtate, it ſhall be firſt applied, and I am of opinion that the reſidue of the perſonal eſtate here ought firſt to be applied in exoneration.

The laſt queſtion is upon the deviſe of the jewels, plate, pictures, *medals*, *furniture*.

Mr. *Clarke*, for the executors, has inſiſted that under the word *furniture*, books will paſs, and that under the word *medals*, pieces of current coin kept with them will paſs.

Where current coin is curious, and kept with medals, it will paſs as ſuch.

If *current coin* are curious pieces, and kept with medals, I am of opinion, notwithſtanding they are current coin, yet, as they are kept with medals, they will paſs as ſuch, for even medals themſelves were once current coin.

A library of books will not paſs as furniture.

But, as I am at preſent adviſed, I am clearly of opinion, that a library of books will not paſs as *furniture* (1).

Nor does it operate at all on my mind, that it will paſs as furniture, becauſe it is a ſmall library; for moſt commonly great libraries are more often put up as ornaments, and leſs accurately choſen, than ſmall ones.

As to the caſe which has been cited of the *Duke of Beaufort* verſus *Lord Dundonald and the Dutcheſs of Beaufort his wife*, 2 *Vern.* 739. there was very little oppoſition, being between a mother and ſon, and I lay no ſtreſs upon it.

But I take it too it has been determined that a library of books will not paſs as furniture; and his Lordſhip decreed accordingly (2). [203]

(1) So *Kelly* v. *Powlet*. *Amb.* 605. (2) *Reg. Lib. A.* 1744. fol. 146.

Baſſet verſus *Baſſet*, *December* 17, 1744. Caſe 66.

LORD CHANCELLOR, 8 Vin. Ab. 87. pl. 12. S. C.

THE bill was brought by a poſthumous child to have an account taken of the clear rents of the father's eſtate *John Pendarvis Baſſet*.

A poſthumous child born after the next rent-day had incurred after the death of his father, is under the 10 & 11 *W.* 3. intitled to the intermediate profits of the lands ſettled as well as the lands themſelves.

The diſputes are both in regard to the real and perſonal eſtate; I will take them in their order.

Firſt, As to the real eſtate.

The queſtion relating to the eſtate of *John Pendarvis Baſſet* is this; the plaintiff, now an infant, is a poſthumous ſon and heir, for the father died, and left his wife enſient of him: the real eſtate conſiſts of different parts, and under different intereſts;

 of

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of some small parts the father was seised in fee; the greatest part is included under a settlement, which was to the father for life, then to secure a rent-charge of 800 *l.* a year to his wife for a jointure, remainder to trustees during the life of the father to preserve contingent remainders, remainder to the first and every other son of *John Pendarvis Basset*, remainder to the defendant the brother of *John Pendarvis Basset*.

The plaintiff was born after the next rent-day had incurred after the death of his father.

It has been insisted by his counsel he had a right to enter, and was intitled to the rents in the intermediate time.

The determination of this point will depend on 10 & 11 *W.* 3. *c.* 16. which is to enable posthumous children to take estates *as if born in their father's life-time.*

The mischief intended to be remedied by the act, "Whereas it often "happens that, by marriage and other settlements, estates are "limited in remainder to the use of the sons and daughters, the "issue of such marriage, with remainders over, *without limiting* "*an estate to trustees to preserve the contingent remainders limited to* "*such sons and daughters,* by which means such sons and daughters, if they happen to be born after the decease of their fa- "ther, are in danger to be defeated of their remainder by the [204] "next in remainder after them, and left unprovided for by such "settlements, contrary to the intent of the parties that made "those settlements.

"*The provision,* be it enacted, that where any estate already "is, or shall hereafter by any marriage or other settlement "be limited in remainder to, or to the use of the first or other "son or sons of the body of any person lawfully begotten, "with any remainder or remainders over, to, or to the use "of any other person or persons, or in remainder to, or to "the use of a daughter or daughters lawfully begotten, with "any remainder or remainders to any other person or persons, "that any other son or sons, or daughter or daughters of such per- "son or persons lawfully begotten, or to be begotten, that "shall be born after the decease of his, her, or their father, "shall and may, by virtue of such settlement, take such estate "so limited to the first and other sons, or to the daughter or "daughters, in the same manner *as if born in the life-time of* "*his, her, or their father, although there shall happen no estate to* "*be limited to trustees after the decease of the father to preserve the* "*contingent remainders to such after-born son or sons,* daughter or "daughters, until he, she, or they come *in esse,* or are born, to "take the same."

It has been insisted on the part of the defendant, the mischief was only the disability of the after-born child to take the estate, because according to *Archer*'s case, 1 *Co.* 66. *b.* every remainder must vest *eo instante* the particular estate determines, and that *Reeve* versus *Long,* 3 *Lev.* 408. was adjudged upon this principle.

There is no notice taken in the act of parliament of the case of *Reeve* versus *Long.*

But

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But I am of opinion this was not the single motive of the act, for the legislature intended intirely to remedy the mischief; the son before lost the whole estate, the profits from the death of his father, and all the subsequent profits.

This to be sure was quite contrary to the intention of the parties, especially in marriage-settlements, for they could never intend it should go, even perhaps to a remote remainder-man; therefore the act of parliament intended to remedy both, and the very title itself expresses it so, *as if born in the father's life-time*.

What is the recital? *Are in danger to be defeated of their remainder*.

This is a general expression, and includes both the losses, the being precluded of the estate, and likewise of the profits.

Therefore this act of parliament ought not to be taken so narrow as the defendant's counsel would have it.

*But allow it to be so, if the enacting words can take it in they shall be extended for that purpose, though the preamble does not warrant it (1); and innumerable instances of this kind are in the law-books.

Enacting words, if they take in the mischief, shall be extended for that purpose, though the preamble to the statute does not warrant it.

[*205]

Next as to the provision of the act, the words are so plain that it is impossible to put any other construction; nay, it would be repealing the act to say, that *the after-born son* should not take the profits; for if he does not take the profits, he does not take in such manner *as if born in the life-time of his father*.

The question to be asked upon this, is, how would he have taken *the estate* if born in the life-time of the father? and the obvious and natural answer would be, why from his death.

How then will he take the profits, if not born in the life-time of his father?

Why likewise from his death.

It has been insisted by the Solicitor General, that in the case of discents upon the heir, he must be *in esse*; and that there are a great many cases that say, a new act of parliament shall be construed according to the rules of the common law.

But that is, where the construction can be consistent with the words of the act.

There might have been some grounds for this if the act had said, he shall take as a son by discent at common law, which, if the legislature had intended it here, might as well have been inserted as the present words.

The next words in the provision are, *although there shall happen no estate to be limited to trustees after the decease of the father to preserve the contingent remainders to such after-born son*, &c.

The like words are in the preamble.

(1) *Vide ante* 1 vol. 182. note.

The

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The legislature intended to put it in the same way, as if there had been trustees to preserve contingent remainders to an after-born son.

There can be no doubt but according to the usual course of conveyancing the profits might have belonged to the posthumous child.

In *Bridgeman's Conveyancer*, *fol.* 301. "In case the said *J.* "(the wife) shall happen to be ensient with child by the said "*J. B.* (the husband) at the time of his death, to the use and
[206] "behoof of the said *J.* (and the two trustees under the settle-"ment) and their heirs, until the said *J.* shall be of such child "delivered, or die, which shall first happen, in trust for the be-"nefit of such child, *&c.*"

These words make the mother a trustee throughout of the profits for the after-born son, and by the words of reference, the after-born child is intitled.

An objection has been started, that there must be a tenant of the freehold, therefore the uncle must take, because, if *trespass* was committed, there must be some person intitled to bring an action, that the uncle is seised, and how can the profits be taken from him.

Perhaps in this court it is not necessary to determine it, for I can come at them another way, and should not scruple to do it.

According to the doctrine in the *Prince*'s case, 8 *Co.* an estate may cease and revive again.

So here this may divest on the death of the father, and vest on the birth of the son.

There is no sort of difficulty: as in the case of a bargain and sale inrolled when the estate vests by relation in the bargainee from the time of the execution of the deed.

This act of parliament has in my opinion estopped every body from saying he was not born in the life-time of his father.

Suppose an ejectment brought by the son, and the demise laid from the death of the father, how could the defendant have excepted to it; for if he laid his demise upon the day after the death of the father, then it would have turned upon the construction of this act; and the demise being only a form of proceeding to bring the title in question, the defendant in ejectment must have confessed lease, entry and ouster: or otherwise an infant could not bring an ejectment if it were considered as a real action.

This court would consider the uncle as a receiver or a trustee for the after-born son, even supposing the point against him at law.

But suppose the point is against him at law, yet I am of opinion this court would consider the uncle as a receiver or a trustee for the after-born son, in like manner as they would consider trustees to preserve contingent remainders, and the words of the act warrant this.

This court considers every person who enters upon the estate of an infant as a guardian and receiver for him.

There are several cases, where in consequence of an act of parliament this court will interfere.

As

As where a new act of parliament is made to alter the law, and the judges are formal in adhering to rules of law, and will not construe according to the words and intention of the act, there this court will take it up; and will give remedy here, though it is the business of judges to mould their practice so as to make it conformable to the legislature.

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Where a new act of parliament is made to alter the law, it is the business of judges to mould their practice so as to render it conformable to the legislature.

It is true the most common way is to give *a legal* remedy; but to instance in acts relating to papists' estates, the court have given remedy here, therefore I am of opinion that the intermediate profits of the settled estate must be accounted for to the son.

As to the profits of the estate descended, they must be accounted for only from the birth of the plaintiff (1).

The profits of the estate descended, are the posthumous child's from his birth only.

The other question relates to the personal estate, as to the sum of 800 *l.* that belonged to Mrs. *Elizabeth Basset*, given by the grandfather of the plaintiff *Francis Basset* by way of general legacy, to be paid at twenty-one or marriage, charged upon a mixed fund partly real and partly personal estate.

A legacy of 800 *l.* devised to *E. B.* payable at 21 or marriage, charged on a mixed fund partly real and partly personal estate; *she died before* 21, *and unmarried. As assets were admitted, this court will not grant an injunction to stay the proceedings in the ecclesiastical court for the recovery of the legacy, as they have a proper jurisdiction for legacies charged on personal estate.*

She died before twenty-one and unmarried.

As assets are admitted here, and as there has been no determination, that where the personal estate is deficient, the real estate shall be applied, I will not direct it now (2). *Vide Jennings* versus *Looks*, 2 *P. Wms.* 276, and *The Duke of Chandos* versus *Talbot*, 2 *P. Wms.* 601, 611.

Will this court grant an injunction, to stay the proceedings in the ecclesiastical court for the recovery of the legacy?

Certainly not, as it is a proper jurisdiction for legacies charged on personal estate.

It must go to the representative of *Elizabeth Basset*, and be paid out of the personal estate.

December the 18th, 1744.

LORD CHANCELLOR,

I had not time yesterday to consider the case of *Basset* versus *Basset* so well as I should have done, but spoke chiefly from my memory, and therefore as I saw several gentlemen yesterday take notes, I think proper to mention what in my opinion is very material, that they may add it to the case. [208]

(1) *Vide Har. Co Litt.* 11. b. note 4. *Goodtitle* v. *Newman*, 3 *Wils.* 526.

(2) *Sed vide Prowse* v. *Abingdon, ante* 1 vol. 482.

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Before the 10 & 11 *W.* 3. all skilful conveyancers inserted a limitation to preserve the contingent remainders to posthumous children, but since the statute they have left it out; which shews their uniform opinion that this act of parliament carries the intermediate profits as well as the estate.

Before the making of 10 & 11 *W.* 3. the constant method of all skilful conveyancers was to insert a limitation to preserve the contingent remainders to posthumous children.

Sometimes the limitations were made to the mother, sometimes to a trustee for the benefit of the child when born.

Ever since this statute, all skilful conveyancers have left it out (1). And this is a strong circumstance to shew the uniform opinion of eminent conveyancers, that this act of parliament carried the intermediate profits as well as the estate.

If they thought there had been any doubt, they would not have left it out, because it would be of consequence, where the estates are large, for if half a year should be incurred, it might be the odds of 5000*l.* to the posthumous child.

The practice of eminent conveyancers has always had great regard paid to it by every court of justice, and the point of dower in the *Countess of Radnor* v. *Vandebendy* was determined intirely from their opinion.

The uniform opinion and practice of eminent conveyancers has always had great regard paid to it by all courts of justice; and as I have mentioned upon other occasions, the case of the *Countess of Radnor* versus *Vandebendy*, *Shower's Parl. Cases* 69. was determined on the point of dower entirely from the opinion of conveyancers upon that head.

(1) 2 *Ves.* 231.

Case 67. *Ashley* versus *Pocock*, *amongst the Cause Petitions*, *December* 19, 1744.

An executor ought to pay that creditor first who uses the first diligence; so in an action at law, he who obtains the first judgment shall be preferred; otherwise as to legatees, for as there is no priority in legacies, an executor should pay them *pari passu*.

MR. *Barnsley* by his will devises the residue of his estate between the *Kingscots and Pococks*; the plaintiff *Ashley* married one of the *Pococks*, the *Kingscots* brought the first bill against *Barnsley*'s executor for an account, and obtained a final decree; then *Ashley* brought the second bill against the executor of *Barnsley*'s executor.

A petition is now preferred by *Ashley*, who is intitled to a distribution under *Barnsley*'s will, for fourteen hundred pounds, to be paid him out of a sum of money placed in the Bank to the credit of this cause.

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Lord Chancellor,

Suppose two creditors at large of the first testator *Barnsley*, and one brings a bill before the other, and obtains a final decree, and a report of the Master, and that report has been confirmed, and then the other brings a bill and obtains a final decree, and his demand is confirmed; to be sure the executor ought to have paid

paid the first who had used the first diligence; so in the case of an action at law, the creditor who obtains the first judgment shall be preferred. ASHLEY v. POCOCK.

But this is not the present case, for the persons here are not creditors of the first testator but legatees under his will; and therefore *Pocock*, the executor of *Barnsley*, should have paid them *pari passu* in his life-time, for there is no priority in legacies (1).

(1) Decreed, that the said sum of 1430*l.* be divided between the parties in proportion to their respective demands. *Reg. Lib. A.* 1744. fol. 63.

Robinson versus *Litton*, *December* 12, 1744. Case 68.

S. C. cited post. 756. S. C. 8 Vin. 475. pl. 16.

THE father of the plaintiffs and defendant, by his will devised to the defendant, his son *John Robinson Litton*, "the lands upon which the question arises, to him and his "heirs for ever, and in case he should not live to twenty one, "and die without issue, he gave the lands to his daughters "(who are the plaintiffs) with several remainders over; then "he goes on, and says, my will is, in case my son shall *not* (1), "attain twenty-one, my estate shall be sold, and the money di- "vided among my daughters, for an augmentation of their "fortunes, and gave to his daughters 10,000*l.* besides."

A. devises lands to his son and his heirs, but in case he should not attain 21, and die without issue, then he gives the lands to his daughters, and directs they should be sold, and the money divided among the daughters: the son, who wants three quarters of a year of 21, intended cutting down 3000*l.* worth of timber; the daughters bring a bill to stay waste: *The court of opinion, they are intitled to an injunction, as it is pursuing the testator's intention, and preserving the value of the estates intended to go to the daughters.*

The estate which came to the son by settlement, was between three and four thousand pounds a year.

The son, who wants about three quarters of a year of coming of age, intends cutting down three thousand pounds worth of timber off the estate.

(1) This part of the case is differently reported in 8 *Vin.* 475. It appears from *Reg. Lib. B.* 1743. fol. 475. that the plaintiffs in this cause (the daughters of the testator) by their counsel alleged, that they were entitled to have certain estates of the testator sold in augmentation of their fortunes, *if the defendant his son should live to attain his age of 21 years*; that the defendant had *threatned* to cut down timber (see *Gibson* v. *Smith*, *ante* 2 vol. 182. *Anon. post.* 485.) that the plaintiffs had thereupon filed their bill for an injunction: that the defendant had put in his answer, and had thereby admitted the devise in the said testator's will; but he insisted, that he was entitled to the *fee simple*, subject to be defeated upon the aforesaid contingency; and as the same might never happen, the plaintiffs had no right to restrain him from cutting down timber. The plaintiffs therefore prayed, that an injunction might be awarded. Ordered that the plaintiffs should reply to the defendant's answer, and that the injunction should be awarded until the hearing. Note, the Editor has not been able to learn whether the injunction was made perpetual he has not met with the decree in the Register's book.

The

ROBINSON v. LITTON.

The bill is brought by the daughters amicably, for an injunction to stay waste, and in order to have the opinion of the court on this point, whether the defendant had a right to cut down the timber.

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LORD CHANCELLOR,

If the defendant has a legal right, and there are no equitable circumstances to restrain him; I shall not do it.

But though he may have a legal right, yet if there are equitable circumstances he may be restrained, and it is not proper for me to give a liberty in doubtful cases.

As to the intention of the testator, he certainly had not the least thought that the son, before his age of 21, should fell all the timber upon the estate.

The inheritance is constituted of the land and timber upon it, and that is devised to be sold for the benefit of his daughters.

The intent was to give the value of the estate at the time it was devised.

A person having meadow ground might as well make it arable.

What is the will?

The clauses must be construed as if they were in one and the same clause.

Suppose the last clause had been first, the defendant would have been considered as a trustee of the inheritance for the benefit of the daughters; and that is the point I shall ground the injunction upon to stay waste.

This court has gone greater lengths to stay waste than the courts of law have in giving actions, or granting prohibitions against it.

Tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the court will not suffer an agreement between two tenants for life to commit waste, to take place against the remainder-man.

As where there is tenant for life, remainder for life, remainder in fee (1); so where there is tenant for life subject to waste, remainder for life dispunishable for waste, remainder in fee, the court will not suffer an agreement between the two tenants for life to commit waste, to take place against the remainder-man, before the time comes when the second tenant for life's power commences (2).

Where a mortgagor commits waste, he will be restrained, because the whole estate is a security.

So, in mortgages and securities, where the mortgagor has been in possession, it is always granted, because the whole estate is a security, but the court does it more strongly where there is a trust.

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The clause in this will amounts to as much, as if he had said, I give my estate to my son and his heirs, till twenty-one, to receive the profits, then to increase my daughters' portions; and here there could be no doubt but the court would have done it.

(1) *Roswell's* Case, 1 *Roll. Ab.* 377. *pl.* 13. *Farrant* v. *Lovell*, *post* 723.

(2) So *Tracy* v. *Tracy*, 1 *Vern.* 23. *Abraham* v. *Bubb*, 2 *Freem.* 55. *post.* 756.

There

There are at this day three sorts of estate in lands; the legal estate, that is the fee or freehold. ROBINSON v. LITTON.

Secondly, The use, which by the statute draws the legal estate after it.

Thirdly, The beneficial interest.

How does it stand upon this devise?

There is an undoubted estate in fee in the defendant, and he may receive the profits till twenty-one.

This amounts to a devise of the beneficial interest to him for that time, and it would be very extraordinary to suffer him to take away a great part of the inheritance of the estate, which was directed to be sold, not for strangers, but for the benefit of the daughters for their portions.

The father is to judge of the provision for his children.

After giving the daughters 10,000*l.* he then directs this shall go in augmentation.

There have been several cases put which have never been determined, as that of a child *in ventre sa mere*, but always said *arguendo*, and I should make no scruple in such a case to grant an injunction.

Lord Hardwicke declared he should have no scruple to grant an injunction to stay waste in favour of a child *in ventre sa mere*, though it has been hitherto said *arguendo* only.

Suppose the case of an executory devise, as in *Gore* v. *Gore* (1), I should doubt whether the heir at law ought not to be restrained from committing waste in the mean time.

Inclinable to think, that in an executory devise the heir at law ought to be restrained from committing waste.

I am therefore of opinion, the injunction ought to be made perpetual.

It is pursuing the intention of the testator, and preserving the value of the estates intended to go to his daughters.

(1) 2 *P. W.* 28. S. C.

Case 69.

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Stamper versus *Millar*, *February* 20, 1744.

A Question in this cause arose upon a settlement made upon a marriage, in which there was a proviso, that one thousand pounds therein mentioned shall and may be applied and laid out by the trustees in the purchase of lands and hereditaments, freehold or copyhold.

A proviso in a settlement that 1000*l.* *shall and may* be laid out by the trustees in the purchase of lands. *Where there is a power to lay out money in land, but the original intention was, it should be considered as money, if not vested in land, it shall not be considered as such, and go to the heir.*

It has been insisted by the plaintiff, the heir at law of the covenantor in the settlement, that the thousand pounds was at all events to be laid out in land; and though the trustees have not done it, yet, that it is to be considered in this court as land (1), and consequently he is intitled to an account from the trustees' representatives.

(1) *Vide Guidot* v. *Guidot*, *post.* 254.

LORD

Stamper v. Millar.

Lord Chancellor,

Where there is a power to lay out money in land under some particular circumstances, but the original intention was that it should be considered as money, if it is not actually vested in land, it shall not be considered as land, and go to the heir.

The first clause under the deed is a clear trust of money, and a complete direction of the intents and purposes for which it was created.

All the words in the deed, while it is to continue money, are positive and imperative.

But the proviso relating to the laying it out in land is only the aforesaid 1000*l.* *shall or may* be applied, *&c.*

Though the words *shall or may* in acts of parliament have been construed absolutely, yet here they were inserted only to leave the election to the trustees, either to continue the 1000*l.* as it was, in personal securities, or call it in, and lay it out in land.

It is different from the trusts of the money, for there is no covenant upon the trustees to do it, but begins with the principal sum of one thousand pounds: and though *shall or may* in acts of parliament have been construed absolutely (1), yet this case differs greatly from that.

All the three trustees are dead, and it is not possible to be done now.

The words *shall or may* were only inserted to leave the election to the trustees, whether they would, for securing the 1000*l.* let it continue as it was already in mortgages or bonds, or call it in from these securities, and lay it out in land.

[213] The heir at law is not at all in the consideration of the settlement, and therefore appears to me to be an extreme clear case against the plaintiff, that the thousand pounds settled by deed is to be considered as money.

His Lordship dismissed the plaintiff's bill, but without costs.

(1) *Attorney General* v. *Lock*, *ante* 166.

Case 70. *Hearne* versus *Barber*, *February* 28, 1744.

S. C. 1 Ves. 17. cited.

Some years after the marriage of the son of a freeman of the city of *London*, the parents on both sides met, and agreed to advance 200*l.* a-piece, to lie by, till they could purchase for him a commission in the army. *It appearing to the court to be intended as a marriage portion, they considered it as an advancement, and a bar to the orphanage share* (1).

A Son of a freeman of the city of *London* received a sum of money from his father after his marriage, but it did not appear to have been paid as a portion, nor under the father's hand, but it was admitted at last, by counsel, that the parents on both sides met, some years after the marriage, and agreed to advance two hundred pounds a-piece, to lie by, till they could purchase a commission in the army for the son.

(1) See *Fawkner* v. *Watts*, *ante* 1 vol. 406. note 1.

The

The question is, Whether this bars the son of the orphanage part? HEARN v. BARBER.

I always took it, that the custom of *London* relates to advancement upon marriage, and though *Jud's Law* is in general terms, still it may be relative to the portion.

But I do not know whether the fact will warrant me to send it to the court of lord mayor and aldermen, to certify whether this is such an advancement as is a bar; for it appears upon the very face of it to be a marriage portion, and as this is the fact, it certainly is an advancement.

But as to another child of the freeman, the sums advanced to him, as he was not married, is clearly no exclusion.

For *Jud's Law*, which was an act of common council, in the time of King *Henry* the Sixth, does not make it a bar, unless it was an advancement upon marriage, for the only doubt upon that law is, whether an advancement to a child either before, or after the marriage, is a bar.

Jud's Law, which was an act of common council in *Henry* the 6th's time, does not make it a bar, unless it was an advancement upon marriage (1).

The difficulty I should have been under was this, had not the fact been (as it is now admitted by the counsel on both sides) whether, supposing a freeman of *London* advances sums of money at different times, and none of them appear under the father's hand to be advanced upon the marriage, this would be a bar to the child's claiming his orphanage part.

**Lord Hardwicke* seemed to make a doubt at first, whether the child, advanced by the father, must not bring the part of the orphanage share he received in his father's life-time into the testamentary part (the father being dead intestate) before he can be intitled to a share under the statute of distributions.

The father being dead intestate, the son intitled to his whole share of the testamentary part without bringing into hotchpot the money he received in advancement.

But upon the hardship of it, as it would in effect be excluding him from receiving any thing from his father, his Lordship held, that he would be intitled to his whole share of the testamentary part, without bringing into hotchpot the money he received in advancement in the life-time of his father. [*214]

(1) *Hume* v. *Edwards*, *post*. 450.

Snellgrove versus *Baily*, *March* 11, 1744. Case 71.

A Bond for 100*l*. was given by one *Spackman* to *Sarah Baily*, which *Sarah Baily* delivered to the defendant, saying, in case I die, it is yours, and then you have something.

S. C. 2 Vef. 432.

S. B. who had a bond for 100 *l*. from one *Spackman*, delivers it to the defendant, saying, in case I die it is yours, and then you will have something: This is a sufficient *donatio causa mortis* to pass the equitable interest of this bond on the intestate's death (1).

(1) *Vide Miller* v. *Miller*, 3 *Cox's P. W*. 356. note 2. *Ward* v. *Turner*, 2 *Vef*. 431. *Hill* v. *Chapman*, 2 *Bro. Cha. Rep*. 612. *Hassell* v. *Tynte*, *Amb*. 318. *Blount* v. *Burrow*, 4 *Bro. Cha. Rep*. 72. *Vef*. jun. 546. S. C. *Tate* v. *Hilbert*, 4 *Bro. Cha. Rep*. 286.

SHELLGROVE v. BAILY.

The plaintiff, as administrator to *Sarah Baily*, has brought this bill to have the bond delivered up.

Mr. *Attorney General*, counsel for the defendant, cited *Drury* versus *Smith*, 1 *P. Wms.* 404, and *Jones* versus *Selby*, *Prec. in Chan.* 300.

LORD CHANCELLOR,

I am satisfied upon the reason of the thing, and the cases which have been cited, that this is a sufficient *donatio causa mortis* to pass the equitable interest of this bond upon the intestate's death.

The bill is brought, knowing where the bond is, to have the defendant deliver it up to him.

The question is, Whether the plaintiff is intitled to take this bond out of the defendant's custody.

Tho' you may give evidence of a deed at law, that is lost, you cannot of a bond, for you must make a profert of it.

This is not a bill brought merely upon the loss of a bond.

You cannot sue at law without the bond; for though you may give evidence of a deed at law that is lost, yet you cannot of a bond, because you must make a profert of it (1).

There is no evidence, but the defendant's answer, that she has the bond; and by her answer, she sets forth the whole case.

The question is, whether this bond is the proper subject of such a gift, especially, considering how far the courts have gone lately in assignments of *choses in action*.

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Put the case, If a chattel in possession had been bought by the intestate, and the bill of sale taken in a third person's name in trust, the legal property would have been in the trustee, and only the equitable interest in the *cestuy que trust*, and yet, if the *cestuy que trust* had delivered it over to the defendant, that would have been a good gift *donatio causa mortis* as to the equitable property.

This comes very near the case of a *chose in action*, and the cases are so, and that in *P. Wms.* particularly is in point *.

Therefore his Lordship decreed for the defendant, and dismissed the bill, but without costs.

(1) So *Anon*, *ante* 2 vol. 61. note 1. *Contra Totty* v. *Nesbitt*, 3 *Term Rep.* 153. in note.

* One by will disposes of his personal estate, and afterwards, by parol, gives 100*l.* bill to one, to deliver over to his nephew, if the testator should die of that sickness; such gift decreed good. *Drury* v. *Smith*, 1 *P. Wms.* 404.

Case 72. *Gage* versus *Bulkeley*, *March* 23, 1744.

A plea of a foreign sentence over-ruled, being in a commissary court only, that is of a political nature, for determining disputes relating to *French* actions.

THIS was a plea of a foreign sentence in a commissary court in *France*, relating to the same matters for which the bill was brought here.

LORD

CAGE v. BULKELEY.

LORD CHANCELLOR,

It must be over-ruled, for it is the most proper case to stand for an answer, with liberty to except, that I ever met with; and the more so, as it is a sentence in a commissary court only, which is of a political nature, in order to determine disputes that might arise in relation to *French* actions.

Packington's Case, *Easter Term*, *May* 9, 1744. Case 73.

S. C. 5 Ba. Ab. 491. pl. 16. Though a person be tenant for life, *without impeachment of waste*, yet this court will grant an injunction to restrain him from cutting down trees in lines or avenues, or ridings in a park, as they are for ornament.

SIR *Herbert Packington*, tenant for life, without impeachment of waste, of an estate at *Westwood*, in *Worcestershire*, being out of the kingdom (1), his agent was made defendant to a bill brought to stay waste by Mr. *Packington*, son of Sir *Herbert*, and first tenant in tail, and has put in an answer.

The motion now was, for an injunction to stay Sir *Herbert Packington's* agent from cutting down trees in the park at *Westwood*, which are either *an ornament*, *or shelter* to the mansion house.

LORD CHANCELLOR, [216

The reason why the common law gave so large a power to a tenant for life, *without impeachment of waste*, was, for the interest of the public, as timber might thereby circulate for shipping and other uses.

It might be for the interest of private families if the common law had not given so large a power to tenant for life, *without impeachment of waste* (2), equal to a tenant in fee; but the common law thought it for the interest of the publick, as timber might thereby circulate for shipping and other uses.

But this court has restrained their power greatly, in comparison of what it was formerly.

The first case came before Lord *Cowper*, of *Vane* versus *Lord Bernard*, 2 *Vern.* 738. where the defendant was restrained from pulling down *Raby Castle*.

The court has gone farther, and has restrained such tenant for life from cutting down timber, either for ornament or shelter of the house; and farther still in the case of *Charlton* versus *Charlton*, in extending it to the case of a park.

There was, indeed, a difference of opinion between Lord Chancellor *King*, and the Master of the *Rolls*, but only in part,

(1) The plaintiff alleged, that the defendant Sir *H. Packington*, had cut down *a great number* of trees, and had *threatened* to cut down and destroy them *all*: that Sir *H. Packington's* agent had agreed for the sale of 2000 trees, and that in consequence thereof *some trees* had been actually felled. *Note*, it does not appear from the allegations of the plaintiff in the present motion, whether the agent had admitted this fact by his answer. Sir *H. Packington's* answer was not come in. *Reg. Lib. B.* 1744. fol. 325.

(2) *Vide Pyne* v. *Dor*, 1 *Durn.* & *East* 55.

PACKINGTON'S Case.

for Lord *King* continued the injunction as to trees for ornament, or shelter, but dissolved it as to straggling trees.

It is very proper for the court to preserve trees that are a shelter to the mansion house.

In the present case, only three oaks (1) have been cut down, and if there was no intention to commit further waste, it would be material, but this appears to be but the beginning of waste; for Sir *Herbert Packington*'s letter has been read in 1741 (2), whilst he was abroad, in which he says, if his son will not join with him in cutting off the intail, he will give orders for cutting down all the ornamental timber trees.

The question is, Whether these are grounds for an injunction to stay waste?

The first objection is, that these trees grow in a wood, and have arisen naturally, and by accident, and not from planting.

Whether trees grow natural, or were planted, if they serve as an ornament, or shelter, it is the same thing.

But I do not think this will hold, because, whether trees grow natural, or were planted, if they serve as an ornament, or shelter, it amounts to the same thing; and it is very probable the situation of the house was chosen for the sake of cutting ridings and vistas through the woods; and I can mention two of this kind of my own acquaintance, *Hampstead*, a seat of Lord *Craven*'s, and another in *Essex*.

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I will restrain the defendant, therefore, from cutting down trees in lines, or avenues, or ridings in the park; and likewise from cutting down trees that are not of a proper growth to be cut.

Upon a suggestion that this might create disputes, as to what were of proper growth, and that very little young timber grows in this park, his Lordship left out the last part of the order, and as to the other, granted the injunction (3).

(1) *Sed vide* note *supra*.

(2) The purport of this letter does not appear in the Register's book in the place above cited.

(3) His Lordship granted the injunction "to restrain Sir *H. Packington*, his "agents, servants and workmen from "cutting down timber trees growing in "*Westwood Park* aforesaid, which were "for the *shelter* or *ornament* of the said "mansion house there; and also any "timber trees, which were planted or "grew in any *lines*, *avenues*, or *ridings*, "for the *ornament of the said park*, *until the* "*said Sir H. Packington shall fully answer* "*the plaintiff's bill.*" *Reg. Lib. B.* 1744. fol. 325. *Vide Aston* v. *Aston*, 1 *Ves.* 264. *Piers* v. *Piers*, *ibid.* 521. *Chamberlyne* v. *Dummer*, 1 *Bro. Cha. Rep.* 166. 3 *Bro. Cha. Rep.* 549. S. C. *Strathmore* v. *Bowes*, 2 *Bro. Cha. Rep.* 88.

Case 74. *Jones* versus *Jones*, *Easter Term*, 1745.

S. C. ante 110. Semb. If the objection by the defendants in the original cause, for want of parties to the supplemental, is not made in the first instance, it is too late to do it when the cause comes on again, where it was put off only for want of formal parties, in order that the decree might be complete.

THIS cause came before Lord *Hardwicke* upon the equity reserved.

An objection was ftarted, that the plaintiff had not made the defendants in the original bill parties to a fupplemental bill, brought after a decree in the original caufe. Jones v. Jones

Lord Chancellor over-ruled the objection.

A fupplemental bill, properly fo called, is a bill brought for any new matter, arifen fince the filing the original bill (1), and before the original comes to a hearing; and there the defendants to the original, ought to have been made parties to the fupplemental bill.

But, when the caufe comes to be heard, if the objection, by the defendants in the original caufe, for want of proper parties to the fupplemental, was not made in the firft inftance (2), it will be too late to make the objection when the caufe comes on again, if it was put off only for want of formal parties by the court, in order that the decree might be complete.

It is not neceffary to make defendants in an original bill parties to a fupplemental one, in the nature of a bill of revivor, nor on the rehearing can they object for want of parties.

In a decree to account, if, during the account, any party fhould die, and a devifee of that party, or any other formal party as truftees (which is the prefent cafe) fhould be wanting, a bill to bring them before the court, is not, in the ftrict fenfe of the word, a fupplemental bill, but rather a fupplemental bill in the nature of a bill of revivor, and to fuch a bill it is not neceffary, to make the defendants in the original bill parties, nor, when the caufe comes on to be reheard, can thofe defendants object for want of parties.

(1) *Brown* v. *Higden, ante* 1 vol. 291. (2) *Llewellyn* v. *Mackworth, ante* 2 vol. 40.

Brown and Others versus *Martin and Heathcote, May* 24, 1745. Cafe 75.

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S. C. ante 1 vol. 160. The fame defendants who made default in another caufe, make default again, at the hearing of a fupplemental one, where the bill is brought by new affignees in a commiffion of bankruptcy chofen fince the decree in the firft caufe, the prayer of this bill praying only that thefe defendants might fhew caufe, and not that they might fhew caufe *why the former decree fhould not be made abfolute*, which it ought to have done, *the court only ordered that the plaintiffs be at liberty to ferve the defendant with a fubpœna to fhew caufe againft the former decree.*

THERE was a decree *nifi* in another caufe againft *Martin* and *Heathcote*, who made default; the plaintiffs there were affignees under a commiffion of bankruptcy againft *Roger Williams*; after the decree new affignees were chofen, who bring a fupplemental bill, in the nature of a bill of revivor; at the hearing the fame defendants make default again.

The queftion is, Whether the plaintiffs, the new affignees, can have any other decree, but that the defendants making default, may fhew caufe why the order fhould not be made abfolute, for carrying the former decree into execution, which decree is only unlefs caufe.

Brown v. Martin.

Lord Chancellor,

This occasions great delay and expence; but the question is, Whether the plaintiffs in the supplemental bill have prayed any more than that the defendants making default should shew cause.

They should have prayed, that the defendants at the same time might shew cause why the former decree should not be made absolute. *N. B.* The prayer of the *subpœna* was so, but not the prayer of the bill.

Upon further consideration the Chancellor made this order.

Let the former decree be revived (1) and let the plaintiffs in the present cause stand in the place of the former to all intents and purposes, and be at liberty to serve the defendants *Martin* and *Heathcote* with a *subpœna* to shew cause against the former decree.

(1) *Vide Anon, ante* 1 vol. 88.

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Trinity Term, June 14, 1745.

Case 76.

Though contemptuous words were spoken of a *subpœna*, and the person serving it severely beaten, yet as these facts were proved by the oath of a single person only, the court would not in the first instance order him to stand committed, but made a rule upon him to shew cause, why he should not stand committed.

Mr. *Green* moved that a person might stand committed, for an abuse of the process of this court, in speaking contemptuously of it, when a *subpœna* was served upon her.

Lord Chancellor was of opinion at first, that notice ought to have been given of the motion before a commitment can be moved for; but upon Mr. *Green*'s suggesting that the person who had served the *subpœna*, had received several blows in the face, and had been very severely beaten, his Lordship ordered the affidavit to be read.

The fact of the contemptuous words, and likewise of the beating, was proved by the oath of a single person only.

His Lordship thought it was not sufficient to found a commitment, unless the charge had been made out by the oaths of two witnesses.

Mr. *Edwards* the Register, on being asked, said, he took it to be the rule of the court, that on a motion for a commitment, the oath of two persons was necessary to prove contemptuous words, upon serving the process of the court; but one was sufficient to prove *a battery* on the person by whom it was served. But Lord *Hardwicke*, doubted of this difference.

But upon asking Mr. *Edwards* the Register, what was the rule in these cases, he said, he took it to be the rule of the court, that upon a motion for a commitment, for contemptuous words, upon serving the process of the court, the oath of two persons is necessary to prove the fact, but that one is sufficient to prove a battery upon the person by whom the process is served.

His Lordship doubted whether this difference had been taken; and therefore made a rule only for the person complained against to shew cause, why he should not stand committed.

Billingsley and Others versus *Wills and Others, June* 17, 1745. Case 77.

THE question arose in this case out of the will of *Arthur Billingsley*, of the 19th of *November* 1720.

The court of opinion that *L.* on the circumstances of the case was not intitled under the will of *A. B.* to a share in 1500 *l.* therein devised, and consequently not transmissible to the defendant *Wills*, her husband and representative.

" I do further give and bequeath to my brother *Capel Billing-*
" *sley the interest of fifteen hundred pounds* during his natural life,
" then from and after the decease of my brother *Capel Bil-*
" *lingsley*, I give the said sum of fifteen hundred pounds unto
" and amongst all and every the younger son and sons, in case [220]
" there be any younger sons, and all and every the daughter and
" daughters of my brother *Capel Billingsley* now lawfully begot-
" ten, or to be hereafter begotten, share and share alike; *but in case*
" *he shall have only daughters lawfully begotten, then only unto and*
" *amongst the younger daughter or daughters, and to be paid to them*
" *all, every and each of them, at and when they shall have obtained*
to their respective ages of one and twenty years.

" But my express will and meaning is, that no elder son, in
" case there shall be more than one son, nor any elder daugh-
" ter, if there be only daughters of my *brother Billinsley living*
" *at his decease, shall have any part, share, or interest in the*
" 1500 *l.*

" But in case all the children of my said brother *Capel Bil-*
" *lingsley* except one, either son or daughter, shall happen to
" die before their respective ages of twenty-one, then I give
" one thousand pounds, part of the fifteen hundred pounds, to
" such surviving only child, whether son or daughter, and to
" be paid to him or her at their age of twenty-one."

The plaintiffs by their bill prayed, that the former cause, so far as relates to the sum of 884 *l.* 14 *s.* 6 *d.* *South-sea* annuities in the bank, may be revived, and the plaintiffs have the benefit thereof.

LORD CHANCELLOR,

The facts in this case are, that *Capel Billingsley* had three children, a son and two daughters, at the time of *Arthur Billingsley*'s making of his will, and one son born after the death of the testator.

Lætitia, one of the daughters, marries and attains her age of twenty-one, but dies before her father, and then he dies.

The question is, Whether *Lætitia*, the daughter of *Capel Billingsley*, having attained her age of twenty-one, but dying in the life-time of the father, was intitled under the will of her uncle *Arthur Billingsley* to a share in the payment of the fifteen hundred pounds, and if it is transmissible to her representative, the defendant *Wills* her husband.

I am of opinion she is not intitled.

There are some obscure clauses in the will.

BILLINGSLEY v. WILLS.

The testator does not begin with giving the fifteen hundred pounds to *Capel Billingsley*, but only the interest; then follows *Item*, from and after the decease of my brother *Capel Billingsley*, I give the said sum of fifteen hundred pounds, *&c.*

[221] Now, if there had been nothing said of the interest before in the will, and the clause had begun with from and after the decease of *Capel Billingsley*, *&c.* there could have been no doubt but the vesting must have been after the father's death, for the payment is annexed to *the substance of the legacy*, which is *Clobery*'s case, 2 *Ventr.* 242 (1).

It is plain in this case nothing is given in the principal sum of 1500 *l.* to the children, till after the death of the father, and that it is not to take place till then in point of vesting, as well as in point of payment.

And to be paid to them all at and when they shall have attained to their respective ages of 21 *years.*

Not intended to make it absolutely payable at 21, but only to restrain the devisees from receiving till 21, if they survived the father, and should be infants at the time of his death.

It has been contended on the part of the defendants that this clause meant to give it to any sons or daughters who should attain the age of 21, at any time.

It is manifest to me that this relates to younger sons and younger daughters, who shall be living after the decease of the father *Capel Billingsley*: for at the time of the testator's making his will, *Capel* had only one son and two daughters; the testator considered, no doubt, both the daughters as younger children, whether in fact so, or not: for this court too considers them as such, though in point of age the daughters are older than the sons (2).

The words, *but in case he should have only daughters*, cannot possibly refer to the time of making the will, for the brother had a son as well as daughters living at that time, therefore must refer to some future time, that if he should *hereafter* have only daughters, *then to the younger daughter or daughters*, *&c.*

The question is, When will be that future time?

It must naturally be the time the testator mentions at the beginning of his will, the death of *Capel Billingsley*.

The words, *when they shall have attained their respective age of* 21 *years*, are not pretended to relate to the time of vesting, because the father was to enjoy the interest of the 1500 *l.* during his life.

But my express will and meaning is, that no elder son shall have any part, share or interest in the 1500 *l.*

[222] What is the effect of these words? Why, plainly to describe further the persons who were to take the benefit of this legacy.

(1) So *Seamer* v. *Bingham*, *ante* 54, 57.

(2) *Hentage* v. *Hunloke*, *ante* 2 vol. 456.

Nor

Nor any elder daughter, if there be only daughters of my brother Billingsley living at his decease, shall have any share, &c. in the 1500l. BILLINGSLEY v. WILLS.

What do the words, *living* at his decease,* refer to? Undoubtedly to both members of the sentence, and is a further description, *videlicet*, that should there be such sons or such daughters, be they one, or the other, who should be living at the time of *Capel Billingsley* the father's decease.

These words are not only descriptive of the child excluded, but likewise of the children which are to take.

All the sons and daughters *living at the time of his decease* falling in with the intention of the testator upon the preceding part of the bequest, *the vesting at the time of his brother's decease.*

It has been said, this must be considered as *vesting* at the death of the testator, in those children who were born before the testator's death, and the child born afterwards, but divesting again, when either of them die before the age of 21; there is no pretence for this, nor will the words admit of such a construction.

It has been said too that the most liberal construction ought to be made in the case of portions.

I do agree in those cases where a father is making a provision for children, which is called *a debt of nature*, the court will strain in their favour: but this is not the present case, for it is the bequest of a collateral relation, and is a mere bounty only.

Upon the latter clause, *but in case all the children of my said brother Capel Billingsley, &c.* It has been said, as this is not restrained to his surviving the father, it ought to affect the construction of the other parts of the will.

But as this is a contingency which has not happened, for there are two sons and a daughter living, I shall not extend it so far as to affect any other preceding clause.

And if the first words are to have the construction I have already mentioned, even *if that one child* had died before his age of 21, he could not have been intitled.

Upon the whole, I am of opinion that all the subsequent words must relate to the preceding, *from and after the decease* of the testator's brother *Capel Billingsley*. [223]

Lord *Hardwicke* ordered, that the dividends which accrued due on the 884 *l.* 14 *s.* 6 *d.* *South-sea* annuities now standing in the name of the Accountant General before *Michaelmas* 1743, and which were not received by *Capel Billingsley* in his life-time, be paid to the plaintiff *Ann Billingsley* the administratrix of her late husband *Capel Billingsley*, and that all such dividends as have accrued since *Michaelmas* 1743, be divided into moieties, and one moiety thereof be paid to the trustees in the assignment by the defendant *Dove* and *Ann* his wife, the surviving daughter of *Capel Billingsley*, and the other moiety of the said dividends be paid to the plaintiff *Ann Billingsley*, *John Billingsley* her son, by his counsel praying the same. And further ordered, that so much of the 884 *l.* 14 *s.* 6 *d.*

South

BILLINGSLEY v. WILLS.

South-sea annuities be sold as is sufficient to answer the costs to such of the parties against whom the bill is dismissed, and that the residue be divided into moieties, and one moiety thereof be transferred to the plaintiff *John Billingsley*, and the other moiety to the trustees, subject to the trusts in the defendant *Dove*'s assignment (1).

(1) *Reg. Lib. A.* 1744. fol. 500.

Case 78. *Williams* versus *Lee*, *June* 26, 1745, *in the Paper of Pleas and Demurrers.*

THE bill was brought in order to set aside a verdict and judgment at law, as obtained against conscience.

The defendant pleads the verdict, and judgment in bar.

The case, as stated by Lord *Hardwicke*, was as follows:

A specific legacy being left to *L.* he applied to the plaintiff the executor, who assented; but delaying to deliver it, *L.* brought an action of trover for it, and had a verdict and 200 *l.* damages; the executor preferred his bill here, and insisted, 1st, An action of trover would not lie for a legacy; and 2dly, That it is a verdict against conscience, the damages being excessive. *The court held, that after an executor has assented, an action of trover certainly lies for a legatee; and that this was not a case where they would relieve against a verdict, and therefore allowed the plea of the verdict and judgment.*

A specific legacy being left under a will to the defendant in this court, he applied to the plaintiff, who was the executor, and who assented to the legacy, but delaying to deliver it, the defendant brought an action of trover for the legacy, consisting of several specific things mentioned in the will, and had a verdict and 200 *l.* damages.

The equity the plaintiff insists upon is, *First*, that an action of trover would not lie for a legacy.

[224] *Secondly*, That it is a verdict against conscience, the damages being excessive.

A legatee is not obliged in every instance to bring a bill for the recovery of a legacy against an executor.

As to *the first*, it is very extraordinary if a legatee must in every instance bring a bill in this court for the recovery of a legacy against an executor; for though it is said by the plaintiff's counsel, that after a testator's debts are paid, the residue vests in an executor, and the legatee is not intitled to it at law, yet, after an executor has assented, an *action of trover* will certainly lie for a legacy (1).

The cases in which this court relieves against verdicts are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury found, and the defendant was ignorant of it at the trial.

As to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for a debt, *&c.* and the defendant, after the verdict, discovers a receipt for the very demand in the action, here the court would relieve.

(1) Vide *Atkins* v. *Hill*, *Cowp.* 284. *Hawkes* v. *Saunders*, *ibid.* 289.

But

But even in these cases they will not always relieve against a verdict, where the defendant submits to try it at law first, when he might by a bill of discovery have come at this fact by the plaintiff's answer upon oath, before any trial at law was had.

WILLIAMS v. LEE. Where a defendant submits to try it at law first, when he might by bill of discovery have come at the fact, from the plaintiff's answer on oath before such trial was had, the court will not always relieve against a verdict.

But this is not the present case; for though the plaintiff at law first of all made an affidavit, the demand was worth forty pounds; that was done only in order to hold the defendant there to special bail, for he declared for things left under the will to the value of 200 *l.* and the jury gave a verdict accordingly.

But supposing the damages were excessive, the defendant at law ought to have applied to the court of Common Pleas, where the cause was tried, and moved for a new trial on account of the excessive damages; and as the defendant at law knew of the plaintiff's affidavit, where he swore to the cause of action being forty pounds, he might have used this as an argument upon the motion for a new trial, that the plaintiff himself upon oath valued the legacy at a fifth part of the damages only.

Allowing the damages to be excessive, the defendant at law ought to have applied to the court where the cause was tried, and moved for a new trial on that account.

His Lordship allowed the plea (1).

(1) *Reg. Lib. B.* 1744. fol. 393.

Aggas versus *Pickerell*, *June* 26, 1745. Case 79.

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A Bill was brought to redeem a mortgage of four hundred pounds upon an estate of four hundred pounds *per ann.* after the mortgagee had been in possession of the mortgaged premisses at least thirty years.

A *plea* of the statute of limitations allowed to a bill for redemption, after a mortgagee had been in possession of the mortgaged premisses at least 30 years (1).

The plaintiff, by way of excuse for not coming sooner, says, the mortgagor was several years out of the kingdom and died abroad.

The defendant pleads the statute of limitations in bar, and by his plea insists upon the length of time, he and the person under whom he claims having enjoyed the estate, and been in quiet possession for such a number of years (2).

(1) *Saunders* v *Horde*, 1 *Cha. Rep.* 184. *Anon. ante* 2 vol. 333.

(2) The mortgagee was let into possession in 1670, and continued so till his death in 1683, from which time the premisses had been quietly enjoyed by the persons claiming under him.

AGGAS v. PICKERELL.

LORD CHANCELLOR,

The excuse the plaintiff makes is not sufficient, for the person who has a right to redeem, should take notice of it at his peril.

Length of time against a bill to redeem is a kind of equitable bar, and by way of analogy to the statute of limitations.

But I have a great doubt with me, whether the defendant can in this case plead the statute of limitations, for insisting on the length of time against a bill to redeem, is only a kind of equitable bar, and taken by way of *analogy* to the statute of limitations (1).

And the rule is for a defendant to insist by his answer (2), and not by plea, upon the length of time.

Mr. *Hoskins* said there was a precedent in Lord Chancellor *King*'s time of such a plea allowed by him, and that also he remembered where a demurrer in such a case was allowed, which is stronger than a plea.

Mr. Solicitor General insisted, that Lord *Hardwicke* doubted in a former case, if a plea of the statute of limitations to a bill to redeem a mortgage could be maintained: whereupon the Chancellor ordered the plea to stand over to search for precedents.

This matter came on again on the 6th of *August*, 1745.

The cases cited in support of the plea were 1 *Ch. Cas.* 102. *Pearson* versus *Pulley*. *Jenner* versus *Cray*, the 26th of *May* 1731. *Clapham* contra *Boyer*, *Ch. Rep.* 110. 1 *Vern.* 418. *St. John* versus *Turner*, *Ryley* versus *Harvest*, *January* 16, 1730. *Trevor* versus *Floyd*, in the court of Exchequer, before Lord Chief Baron *Pengelly*.

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LORD CHANCELLOR,

These cases are very strong, especially those that are cited from the books called *Chancery Cases*, and *Chancery Reports*, and there can be no inconvenience from a plea.

But I am of a different opinion where it is insisted on by way of demurrer (3), for how is it possible to give a greater allowance to length of time, than the statute of limitations does?

Lord Chancellor *King* in a case of this kind allowed a demurrer; but Lord *Hardwicke* said he was of a different opinion, and should have over-ruled it, because, if allowed, the bill would be out of court, and that is carrying it too far.

If a bill is brought to redeem, and the plaintiff sets forth that he has been long out of possession, and does not shew himself to be within any of the exceptions of the statute, you cannot take advantage of that by demurrer; for the plaintiff may make it appear by way of reply, or by amending his bill, he is within the

(1) *Sibson* v. *Fletcher*, 1 *Cha. Rep.* 59. *Hales* v. *Hales*, *ibid.* 105. *Yates* v. *Hambly*, *ante* 2 vol. 362. *Mellor* v. *Lees*, *ibid.* 496. *Proctor* v. *Oates*, *ibid.* 140. *Anon.* *post.* 313.

(2) *Pearson* v. *Pulley*, 1 *Cha. Ca.* 102. *Lockwood* v. *Ewer*, *ante* 2 vol. 303. *Tash* v. *White*, 3 *Bro. Cha. Rep.* 289.

(3) *Sed contra Saunders* v. *Hord*, 1 *Cha. Rep.* 184. *Fraser* v. *Moore*, *Bunb.* 54. *Jenner* v. *Tracy*, 3 *P. W.* 287, note [B.] *Beckford* v. *Close*, cited 3 *Bro. Cha. Rep.* 644.

savings

savings of the statute, or upon a plea, he may prove himself to be within the exceptions. Agsass v. Pickerell.

But if it is to be allowed by way of demurrer, the bill would be out of court, and that I think is carrying it too far.

His Lordship allowed the plea in this case (1).

(1) *Reg. Lib. A.* 1744. fol. 573.

Southcot versus *Watson*, *June* 9, 1745, *stood for Judgment.* Case 80.

General *Pulteney* by his will gives in the first part of it to Mrs. *Ann Watson* the yearly sum of 400*l.* payable quarterly; and in the last clause gives her all his household goods and furniture, (three pictures excepted) and all his plate, linen, watches, jewels and clothes whatsoever, and declared her sole executrix. The bill was brought for an account of such part of the personal estate as is undisposed of, and for a distribution. *The bequest of the specific things to Mrs. Watson excludes her from the residue* (1).

THE bill was brought for an account of the personal estate of General *Pulteney* undisposed of by his will, dated the 7th of *January* 1741, "whereby he gave several annuities "out of his stocks in the funds, amongst the rest to Mrs. *Ann* "*Watson* the yearly sum of 400*l.* payable quarterly, and six "other annuities; then follow these words: *Item*, my will is, "that what dividends or sums of money are now due upon any "of the stocks or funds in the Bank, *South-sea*, *India*, or other "public funds or securities, and not received by me, the same "shall be received by my executrix, and laid out in the pur-"chase of some other stocks, with the advice of *William Pulte-"ney*, Esq; for the providing a fund for the better payment of "the said annuities, in case my present estate in the stocks is "not sufficient for that purpose; but if it should be found so to "be by my said executrix, not doubting but she will give a faith-"ful account of what is belonging to me in the said several "stocks, then the said dividends to be received by* her as afore-"said, shall be laid out in such manner as my said executrix "and *William Pulteney* shall agree to be most proper for the "purposes following.

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"*Item*, After the deceases of the several annuitants afore-"said, I give and bequeath to my nephew *William Pulteney* "Esq; his executors, administrators and assigns, all my prin-"cipal stocks (2), and securities whatsoever, in trust for his son "*William* now an infant, and for such younger son and sons "as he the said *William* the infant shall leave at his death, share "and share alike; and in case there is but one younger son, "then I give the whole to him. *Item*, I give to Mrs. *Ann Wat-"son* all my houshold goods and furniture, (except what is herein "after excepted), and all my plate, linen, watches, jewels and "clothes whatsoever, and I declare the said *Ann Watson* sole "executrix."

N. B. *The exception was of two pictures to the Dutchess of Mountague, and another to somebody else.*

(1) So *Randall* v. *Bookey*, 2 *Vern.* 425. *Martin* v. *Rebow*, 1 *Bro. Cha. Rep.* 154. *Nourse* v. *Finch*, *Ves.* junior, 344.

(2) "In the Bank, *South-sea*, *India*, "Bank and other public funds and secu-"rities, or in other securities whatsoever."

Southcot v. Watson.

Lord Chancellor,

This cause comes before the court on a bill brought by the plaintiff to have an account of some part of the personal estate of General *Pulteney* undisposed of by his will, and to have it distributed according to the statute made for that purpose of intestates' estates.

The principal annuity is given to Mrs. *Watson* of four hundred pounds *per annum*, the first payment to be made on the first quarter day after General *Pulteney*'s death.

Then follows the clause upon which the question principally arises.

Item, *After the decease of the several annuitants aforesaid, I give and bequeath to my nephew William Pulteney, Esq; his executors and administrators, all my principal stocks and securities whatsoever, &c.*

The most essential part to the present cause is what follows: Item, *I give to Mrs. Ann Watson all my houshold goods and furniture, (except what is herein after excepted), &c.* and all my plate, &c.

The testator died about three days after making his will on the 10th of *June* 1741.

The questions will fall *materially* under the following divisions:

First, Whether in a court of equity any part of the personal estate may be said to be undisposed of by his will?

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Making a will and an executor, is held at law to be a disposition of the whole personal estate.

This is merely a consideration of equity; for at common law making a will and an executor is held to be a disposition of the whole personal estate.

The rule of this court has been, ever since the case of *Foster* vers. *Munt*, that where a man gives his executor a legacy, he is to be considered as a trustee for the next of kin.

Ever since the case of *Foster* versus *Munt*, 1 *Vern.* 473. before Lord Chancellor *Jefferies*, which underwent various fates, the doctrine established in this court has been, that where a man makes a will and an executor, and gives him a legacy, he is to be considered as a trustee merely for the next of kin, upon an equity founded on the statute of distributions (1).

It is true this doctrine has prevailed by different steps and degrees.

Whether a legacy be given to an executor for his care and pains, or generally, it equally excludes him from the whole.

In *Foster* and *Munt* the legacy was given to executors for care and pains, and held to be a bar of the residue; afterwards determined so where it was a legacy given generally; for there is nothing more in one case than in the other, because it could not be imagined if a testator gave his executor a particular legacy, that he could intend him the whole.

Some cases indeed since have not so strictly adhered to this rule.

(1) See Mr. *Cox*'s note to *Farrington* v. *Knightley*, 1 *P. W.* 550.

But

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But in the case of *Farrington* versus *Knightly*, 1 *P. Wms*. 544, 551. Lord *Macclesfield* said, he had consulted with Mr. *Vernon* upon this subject, who said there had been so many decrees upon the point where a legacy was given to an executor, and no disposition of the surplus, that the executor was but a trustee for such surplus; and this point had been thereby so fully established, that he did not think it worth while to take notice of any latter decrees of this nature, apprehending it to be a principle as much fixed, *as that fee-simple land should descend to the heir*.

Mr. *Vernon* said to Lord *Macclesfield*, who consulted him on this subject, that he aprehended it to be a principle as much fixed, as that fee simple land should descend to the heir.

The plaintiff, and some of the defendants, insist the executrix was excluded from the surplus by several legacies being given to her, and that any one of them would have been sufficient to bar her.

First, As to the four hundred pounds a year annuity, if it rested upon that, it would admit of great doubt, for the first payment is not to begin till the first quarter-day after the testator's death.

Had the question rested on Mrs. *Watson*'s annuity only, it would have admitted of great doubt, as the first payment was not to begin till the quarter-day after testator's death.

So that if she had proved the will, and yet died before that quarter-day, she would not have been intitled.

It is charged too upon a fund which is liable to other legacies, [229] therefore the annuity arises by way of charge upon a legacy, or by way of exception out of it; like the case of *Lady Granville* and *the Dutchess of Beaufort*, 2 *Vern*. 648.

The annuity being charged on a fund liable to other legacies, is either by way of charge, or exception out of it; had it been given out of the general residue it might have been a bar.

If given out of the general residue, indeed, it might have been a bar, because otherwise it would have been giving all, and some, which is an absurdity.

Next as to houshold goods and furniture, and all my plate, linen, watches, jewels and clothes.

This is a bequest of specific things, though under a general description.

But yet I am of opinion that she is excluded of the residue.

Several objections have been made.

First, That though a pecuniary legacy will exclude executors, yet a specific one will not; and several cases have been cited for this purpose; and it has been said, that the testator might intend that in case there should be a deficiency of the surplus, she should be secure of *the specific legacies*.

This reasoning would prove too much, it would hold almost as strongly in the case of a pecuniary legacy, for it might be said the testator intended his executor should take something at all events, and not depend merely upon the sufficiency of the surplus.

As for the precedents which have been cited for the executrix, they seem to me to fail entirely.

The

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The first case mentioned was *Jones* v. *Westcomb*, *Prec. in Chanc.* 316. the report of this case is very short as to the point for which it is here applied, and is besides the case of a wife.

A husband devised his library of books to *A.* except ten books such as his wife should chuse, and made her executrix; held she was not excluded from the surplus.

The next case was *Griffith* v. *Rogers*, *Prec. in Chan.* 231. a husband devises his library of books to *A.* except ten books, such as his wife should chuse, and made her executrix, and held she was not excluded from the surplus.

The strong reason which directed the court in the determination of that case was, that there was no bequest of the books to the wife, but the whole to another.

In this case the determination arose from the particular penning of the will; but the strong reason which directed the court in their determination was, that there was no bequest of the *books at all to the wife, but the whole to another person, and uncertain what she will take, but left to fall into the surplus.

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The next case was *Ball* v. *Smith*, 2 *Vern.* 633. there the whole reason rests in a manner, upon its being the case of a wife, and no stress was laid at all on its being a specific legacy.

On the other hand, that specific legacies, generally speaking, will exclude executors equally with pecuniary, are clearly and strongly proved by the cases cited for that purpose.

The case of *Lady Granville* v. *Dutchess of Beaufort*, in 2 *Vern.* 648. and 1 *P. Wms.* 116. is extremely material.

The ground of the reversal of the decree in the house of Lords was, that the legacy operated by way of exception out of, or was a charge upon a legacy given to another*.

If it had been before settled that specific legacies would not have barred an executor of the residue, there would have been no occasion to have resort to this distinction; for, according to the common rule, *exceptio probat regulam.*

* The bill here was brought for a distribution of the surplus against the defendant, as executrix to the late Duke of *Beaufort*, who had devised the use of his table plate to the Dutchess for life, and afterwards to his grandson, and made no disposition of the surplus. *Lord Chancellor Cowper* admitted proofs to be read, that the testator intended to give *the surplus* to his executrix, but not thinking the evidence strong enough, decreed a distribution.

This cause came afterwards before the house of Lords upon appeal on the 18th of *December* 1710. The appellant's counsel insisted that it was proved in the cause, that it was the intent of the testator that the appellant should have the surplus of the personal estate to her own use; which proof, as it agrees with the rules of law to preserve the legal title to the executrix, that of common right she has to the surplus, so it shall prevent and ought to rebut the construction of equity, which would create a resulting trust, and make the executrix to be a trustee in equity for the next of kin; and for these reasons (among others) prayed that the decree might be reversed, and *it was reversed accordingly without division.* *MS Report*, Dutchess of *Beaufort* appellant, Lady *Granville* respondent. *Viner*, title *Devise*, *p.* 194, *sect.* 21.

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The case of *Shrimpton* v. *Stanhope* 1736 (1). before Lord *Talbot*.

A bill was brought for a distribution among three children the next of kin; the words of the will were, I likewise appoint them heirs to my personal estate, consisting of, &c. specifying what, together with my books.

Lord *Talbot* was of opinion the surplus was undisposed and distributable.

This is a plain authority that specific legacies bar an executor, and though the outset mentioned generally personal estate, yet Lord *Talbot* restrained it by the particular words that followed afterwards.

Lord *Talbot*'s reasoning as to the personal estate, was that this clause was not intended to give them the personal estate by implication, but to vest it in them as *executors* only. [231]

And that the last clause was explanatory only.

Upon the whole he decreed a distribution.

The next cause was *Newstad* v. *Johnson*, before me, *July* 15, 1740 (2). I had not the least thought in that case there was any difference between specific legacies and pecuniary, as to barring executors.

There was a plain reason there, why the testator separated the stock from the rest of his personal estate, because otherwise the husband of the legatee would have been intitled.

In the next place some arguments have been used from the words of the will; first, upon the introductory clause, that it is very strong to shew he intended to dispose of the whole.

Nothing could be stronger than the introduction in the case of *Farringdon* v. *Knightly*, and yet determined to be a bar. And I look upon this as nothing more than words of form thrown in by drawers of wills.

The law throws the surplus on the next of kin who take it by a kind of succession *ab intestato*.

The next of kin take by a kind of succession *ab intestato*, without the assistance of this court; and it is the law throws it upon them.

It has been said that Mrs. *Watson* should be accountable for nothing except the stocks, but the words will not warrant this construction so as to excuse her from accounting for so much of the personal estate as is not disposed of by the will.

To consider it in one plain instance, she must account for *the dividends*.

Another objection has been started from the circumstances attending the devise of specific legacies themselves, that where another reason appears for giving them she shall not be excluded; and that this is introduced only for the sake of excepting the three pictures out of it.

The exception of the three pictures is not out of the whole personal estate, but out of a particular species only, and there-

(1) Mr. *Cox* in his note to *Farrington* v. *Knightley*, 1 *P. W.* 550 observes, "That "the case of *Shrimpton* v. *Stanhope*, is not "a case of *distinct specific* legacies, for it "appears from *Reg. Lib. B.* 1736. fol. "104. that the testator there gave some "specific legacies to a man and his "wife *jointly*, whom he also made his "*executors*."

(2) Ante 2 vol. 45. S. C.

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fore cannot be offered as a reason for his particular expressing another thing; besides, it would have been much more natural to have given the pictures as distinct legacies, and not as an exception out of a legacy.

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All the excepted cases will be found to be grounded upon one of these three reasons.

First, By way of particular interest, or *usufructuary* estate out of a legacy given to another person.

Secondly, By way of exception.

Thirdly, Where it is given for the sake of some trust which the executor is to perform.

But the present case cannot fall in with any of these distinctions.

This is not an exception for the benefit of the executrix out of a legacy given to another (1), but it is an exception for other persons out of a particular species of personal estate given to the executrix herself.

No defendant by his answer can affect the rights of other parties.

No weight is to be laid on any passages in answers, for no defendant by his answer can affect the rights of other parties, or persons.

The consequence of the whole upon this point is, that the undisposed part of the personal estate must go amongst the next of kin, but must bear the burthen of the debts and funeral expences in the first place.

The second question is, What is the undisposed part of the personal estate?

Bank notes cannot be considered as a security for money, but according to common usage, which regards them always as cash (2).

In the first place, the ready cash in his house, in the next the rents unreceived; secondly, the bank notes for 100*l.* It has been said that these ought to be considered only as a security for money; but I am opinion they must be taken according to the common usage and notion of bank notes, which are always considered as cash, and made payable to bearer; if securities were to be extended in this manner, arrears of rent might be called so, for *the reddendum*, and covenants for payment of rent, might be plausibly called a security for money.

The next particular which is insisted to be undisposed of, is the dividend upon testator's bank stock lying in the bank, endeavoured to be brought within the description of the will.

In the first place the dividends so lying in the bank do not answer the description, for they are not dividends to become due upon the stocks, for the company had paid them before.

Now the testator having kept his cash with the bank, the receipt of the bank was his receipt; and you might as well say that cash in the hands of a steward received by rents, is not the cash of the principal.

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I am of opinion the balance of testator's account in the bank must be considered as undisposed of.

Thus far I am of opinion for the plaintiff.

But as to the dividends unreceived, I am of opinion for the defendant.

(1) *Newstead* v. *Johnson*, *ante* 2 vol. (2) *Popham* v. *Lady Aylesbury*, *Amb.* 68.

In case his personal estate in the stocks is not sufficient, &c. Vide the will. SOUTHCOT v. WATSON.

These are words of reference.

The next sentence is plainly connected with the former.

Then the said dividends shall be laid out in such manner as, *&c.*

There is no doubt as to this part of the will.

The only remaining consideration is as to certain things which are mentioned to be given in the will, and yet not intirely given.

And this is founded on the words of the will, where stocks are devised to Lord *Bath.*

The question results to this, when the bequest to Lord *Pulteney* is to commence in point of interest?

It is very inaccurately penned, but the court must put such construction as will best answer the intention.

Was Lord *Pulteney* to be kept out of the possession of enjoying the surplus of the dividends of these stocks till even the annuitant of ten pounds a year is dead? That would be very hard.

The commencement of the trust is put upon some event of dying, and though I have no doubt of the intention in my own private opinion, yet I must consider it with judicial eyes.

Though the court can construe and expound the words of a testator's will, yet they cannot strike them out of it entirely.

The court may expound the words of a will, but cannot strike them out.

It is plain the testator did not think of any surplus of the dividends, for he has provided an auxiliary fund if dividends should fail; but when any of the annuitants died, he saw there would be a surplus, and has provided for it; and this must be construed like the case of *Hylet* versus *Chip*, in *Cro. Jac.* 259. and *Aylet* versus *Choppin* in *Yelv.* 183. [234]

It is true an objection has been made, that cross-remainders by implication cannot be between more than three. And the case of *Barnard* versus *Bewden*, before me the 14th of *November*, 1743, has been cited.

A precedent by no means applicable, for the words there were peremptory after the decease of a particular person; I was very apprehensive the construction I put upon it was not according to the intention; but I could not so construe it, without striking words out of the will: but here the court may construe it according to the intention of the testator, which they are bound to do, if they can consistently with the rules of law.

It has been said, that the death of any one of the annuitants doth not influence the surplus of dividends; and I agree it doth not as to the dividends themselves, but after the gift commences, it attaches upon the stocks, and will carry all the dividends.

This is my opinion upon the several parts of the will.

His Lordship declared, that so much of the testator's personal estate, as is not disposed of by his will, belongs to and ought

 to

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to be distributed among his next of kin, subject to his debts and funeral expences.

He also declared that the testator's cash, ready money, bank notes, arrears of rent, the money due to the testator on his account kept with the bank (1), and also the surplus of the dividends accrued upon the said stock between the testator's death, and the death of Mrs. *Ann Watson*, one of the annuitants, over and above what was sufficient to satisfy the growing payments of the annuity given during that time, ought to be considered as undisposed of by the said will.

But that all such dividends and sums of money as were due, and in arrear upon any of the said testator's stocks, and accrued at the time of his death, and also the surplus of the said dividends accrued or to accrue upon the said stocks, between the testator's death and the decease of such of the annuitants as died first, ought to be considered as disposed of by the said will for the benefit of Lord *Pulteney*, and his younger sons, subject to the contingency thereon.

Therefore I decree that it be referred to a Master to take an account of all such parts of the said testator's personal estate as are not disposed of by the will, as have been received by *Ann Watson* in her life-time, and by defendant *Nathaniel Watson* since her death (2).

(1) "And all debts due to the testator at the time of his decease, and also the surplus of the dividends accrued upon the said stocks between the said testator's death, and the death of such of the annuitants as died first, over and above what was sufficient to satisfy all the annuities given during that time, ought to be considered as undisposed by the said will But all such dividends and sums of money as were due, and in arrear upon any of the said testator s stocks at the time of his death, and also the whole surplus of 'the said dividends accrued or to accrue upon the said stocks since the decease of such of the annuitants as died 'first, ought to be considered as disposed 'of by the said will for the benefit of 'Lord *Pulteney*, subject to the contin'gencies in the said will."

(2) *Reg. Lib. B.* 1744. fol. 146.

Case 81. *At the Second Seal after Trinity Term*, 1744.

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The Master, to whom it was referred, reported the proceedings under a commission for examination of witnesses irregular; on exceptions the court thought them regular, and allowed the exceptions, and the party who succeeded had his costs of the application: Lord *Hardwicke* discharged the order for costs, because the plaintiff's was not a vexatious proceeding, but in the Master's opinion well founded; and the rule is never to give costs but where no just ground appears for the proceeding.

MR. Solicitor General moved to discharge an order for costs, on the following case.

There had been a reference by the direction of the court, to a Master, to inquire into the regularity of proceedings under a commission for examination of witnesses, and the Master reported them irregular; exceptions were taken to the Master's report; and the court, thinking the proceedings regular, allowed the exception, and the party that succeeded had his costs of the application.

LORD

LORD CHANCELLOR,

I think this analogous to the case, where exceptions are taken to a defendant's answer for insufficiency, and the Master reports it insufficient, and, upon exceptions, the court is of opinion it is sufficient, the party succeeding in this application, shall not have the costs of it, but it shall wait the event of the cause; and for this reason, because the plaintiff's did not appear to be a proceeding merely vexatious, but, in the opinion of the Master, well founded; and the rule of the court is never to give costs, but where there appears to have been no just grounds for the proceeding.

Exceptions to an answer for insufficiency, and so reported; upon exceptions, the court held it to be sufficient; the party succeeding in the application not intitled to costs, but it shall wait the event of this cause.

But, though I am of opinion to discharge the present order, yet, I think, on a special motion, and stating particular circumstances in the case, the court might give costs, though the Master had reported it in favour of the other party.

On a special motion, and stating particular circumstances, the court may give costs, though the Master reports it in favour of the other party.

His Lordship discharged the order here for costs.

Mead versus *Lord Orrery and Others*, *July* 19, 1745. Case 82.

THE plaintiffs, two of the children of *John Mead*, the elder, of *London*, banker, charge, by their bill, that he had a mortgage of three thousand five hundred pounds on the estate of *William Kirkby*, and that being so intitled, about the 25th of *April* 1712, died, leaving *Jane* his widow, and five children; that, by his will, he appointed his wife, his eldest son *John Mead*, and another person, executors, and thereby devised to his executors and their heirs, *&c.* "all his real and personal estate, "not by his will otherwise disposed of, in trust that they should, "by charging, leasing, or selling his estates, or any of them, "raise money for the payment of all his debts, and what should "remain, he directs to be divided into equal proportions, "share and share alike, between his five children, and left "it to his executors, to make proper allowances for their "maintenance, until there should be a distribution made of his "estates."

S. C. cited 2 Ves. 467. Three executors join in assigning a mortgage of their testator as a security for the receivership of one of them. As the act which was done in this case appears to be the transaction of all the executors, and two not interested, and no colour of fraud, but a purchase for a valuable consideration, there are not sufficient grounds to set aside this assignment of a mortgage belonging to *J. M.* the testator (1).

(1) In *Bonny* v. *Ridgard*, cited 2 *Bro. Cha. Rep.* 438. 4 *Bro. Cha. Rep.* 130. The Master of the Rolls was of opinion, "that the rule was carried too far in "*Mead* v. *Lord Orrery*; for tho' it is clear, "that an executor may dispose of assets, "and any body purchasing of him is not "bound to see to the application of the "money, yet this shall never protect any "body, who purchases from an executor "with a full knowledge that the money "was to be misapplied; and that *mortgaging a leasehold* property of the testator, did not seem to be the *natural* way "of dealing with assets, and was in itself a very suspicious circumstance." See the cases cited in the notes to *Nugent* v. *Giffard*, *ante* 1 vol. 463.

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That *Jane Mead* the widow, and *John Mead* the younger, proved the will, and after the testator's debts and legacies were paid, a large surplus remained to be divided amongst the five children.

In a cause between the executor of *Fowle*, who was partner with old *Mead*, and his executors, the mortgage deed relating to *William Kirkby*'s estate, was directed to be left in the hands of Mr. *Bennet*, the Master in Chancery, till the partnership account should be finally adjusted (1).

That the defendants, the executors of the Dutchess of *Buckingham*, pretend, they have got an assignment of the legal estate of the mortgaged premisses from *John Mead* the younger, in his life-time, and refuse to account to the plaintiffs for what they have received out of the said premisses, or to deliver up the deeds and writings, and therefore the bill was brought for an account, and for the deeds.

What is principally insisted on by the defendants, the executors of the Dutchess of *Buckingham*, is, that on the 18th of *May* 1726, *John Mead*, the younger, was appointed receiver of the rents and profits of all the real and personal estate of *Edmund* Duke of *Buckinghamshire*, and that *John Mead* proposed to assign this mortgage on *Kirkby*'s estate to Master *Bennet*, as a security for his receivership; and accordingly, by deed dated the 21st of *December*, 1726, (to which *Jane Mead*, and the other executor of old *Mead* were parties), reciting, that there was due on the mortgage 9000*l*. and upwards, and that the same was the proper money of *John Mead* the younger, they conveyed to *Thomas Bennet*, his heirs and assigns, the said mortgage, and all money due thereon, to hold to him, his heirs and assigns for ever, *subject to a proviso, that if the said* John Mead *should, and did, once in a year, during the time he continued receiver of the rents, profits, &c. of Duke* Edmund's *real and personal estates, justly account with* Thomas Bennet, *and well and truly pay the balance of such account, then*
[237] Thomas Bennet *was to re-convey the mortgaged premisses to* John Mead, *his heirs, executors or administrators.*

That *Mead* the younger died intestate, without having accounted for what he had received by virtue of his receivership, and greatly indebted to Duke *Edmund*'s estate, and that they, as executors of the Dutchess, who was the executrix of Duke *Edmund*, claim the benefit of the mortgage and security to Master *Bennet*, and insist the plaintiffs have no right to any of the money due on the mortgage, till satisfaction is made for what is due from *John Mead* the younger, on account of such receivership; and though they believe they may have seen a copy of the will of *John Mead* the elder, yet insist, notwithstanding any thing in that will, *John Mead* the younger, and the other executors, had full power to assign the mortgage as aforesaid, as

(1) The decree was made in 1715, and the Master made his report in 1731, till which period it seems to have been doubtful, whether the mortgage in question belonged to the representatives of *Fowle* or of old *Mead*.

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it was not specifically devised by the will to any particular persons, or to any particular use, and consequently did absolutely vest in the executors.

LORD CHANCELLOR,

With regard to what Master *Bennet* has done, I intirely disapprove of going out of the course of the court, which requires *a security by the receiver, and two securities* in a recognizance, and taking an assignment of a mortgage belonging to the receiver instead of it, is very improper.

The course of the court requires a security by the receiver, and two sureties, in a recognizance, and taking the assignment of a mortgage belonging to a receiver very improper, and ought not to have been done.

There are two questions in this cause.

First, Whether the plaintiffs, as residuary legatees of old *John Mead*, are intitled to be relieved against the assignment of the mortgage, and to have such account, &c. as is prayed by their bill?

Secondly, Or whether the executors of *Edmund* Duke of *Buckinghamshire* are intitled to retain this assignment, and if intitled, how far they shall have the benefit?

The first question depends upon this point, whether this was a good alienation of the assets of old *John Mead* the testator.

It must be admitted to be good in point of law, for, unless executors do it collusively, it is good there, and neither creditors or legatees can call it back again.

An alienation of assets by an executor, good at law, unless done collusively.

The legal estate is vested in *Bennet*, the Master in Chancery; but it has been insisted by the plaintiffs, if good in law, yet not in equity.

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Thus much must be admitted, that as the defendants have gained the legal estate, and likewise for a valuable consideration, it must be a very powerful equity to take it from them.

It has been contended by the plaintiffs, that this mortgage was part of the personal assets of old *John Mead*, and a trust for the residuary legatees, and that the parties had notice at the time the assignment was made to *Bennet* of the plaintiff's right, and therefore cannot avail themselves of it under such circumstances.

Now to be sure, notice in a court of equity is extremely material; for if a person will purchase with notice of another's right, his giving a consideration will not avail him, for he throws away his money voluntarily, and of his own free will (1).

If a person will purchase with notice of another's right, giving a consideration will not avail him.

The cases of notice cited by the plaintiff's counsel are very material as to the general rule, but not so material as to the par-

Whoever takes from an executor, must do it with notice of a will, and if the doctrine was to prevail of notice to an assignee of an executor, it would hold in every will, and none would dare to purchase or take an assignment from an executor.

(1) *Saunders* v. *Dehew*, 2 *Vern.* 271

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ticular case of an executor; for whoever takes any thing from an executor, must do it always with notice of a will, and if this doctrine was to prevail of notice to an assignee of an executor, it would extend to any case of a will, and no body would dare to purchase or take an assignment from an executor.

Therefore the bare points of notice of the will is not sufficient.

This is the first attempt that has been made by a residuary legatee, to overturn an assignment by an executor of the assets of his testator.

The precedents of following assets into the hands of purchasers as assignees, have been chiefly in the case of creditors.

Now, creditors have a demand against an executor for the whole assets of the testator, after the account is made up, but not by way of specific lien on the assets.

A specific legatee has a lien on the assets for that specific part after the executor has assented, otherwise as to a residuary legatee.

There have been some instances too of specific legatees following assets, for he has a specific lien upon the assets for that specific part, after the executor has assented, and differs from a residuary legatee, who has no demand upon any particular part.

But the claim of the plaintiffs depends upon an account to be taken, and a liquidation of the whole, which of consequence supposes an alienation or variation of assets by an executor, in order to make a satisfaction for those demands, which must precede the legacies.

So much in general; next as to the particular points.

[239] It has been insisted for the plaintiffs, that executors are to be considered as trustees, and the assignment made by them in this light; or if it was made by them as executors only, it was not a right disposition of assets, and had not *a tendency at all* (as Mr. *Wilbraham* expressed it) to a due administration of assets.

This mortgage is admitted to be part of the personal estate of old *John Mead*, and came to him from the partnership in his shop, as a banker; these are clear facts.

Consider then how far he has devised his estate; there are three executors to the will, *and devises to them and their heirs, &c. all his real and personal estate, not by his will otherwise disposed of, in trust, &c. for payment of debts, and what shall remain, to be divided equally among his five children.*

From hence it has been insisted on by the plaintiff's counsel, that the whole of the personal estate of old *John Mead*, in the hands of the executors, was affected by this trust.

I am of a different opinion, and that the manner of devising here does not alter or restrain the power of executors over the personal estate.

What does this amount to more than appointing them executors, and giving the surplus of this estate to be divided equally between his children?

The testator, as to a particular part of his personal estate, may affect it with a trust; but as to the whole personal estate, when he makes them executors, he gives them the legal right, and

and though he does after give the residue to be divided among his children, it does not take away their power as executors.

It would be most mischievous if it did.

It has been argued, that as all the executors joined in the assignment, notwithstanding one had renounced, they were considered as trustees; but there is nothing in this observation, for though one renounced he never released to the other two, and might have come in afterwards and proved the will, for the whole vests in him, and before probate the executor may dispose of the estate (1).

The plaintiff's counsel have gone further, and insist, that taking it abstractedly from a trust, supposing they acted as executors, yet they could not assign this mortgage

A point that deserves well to be considered.

*It is undoubtedly a good disposition in law, and has vested the legal interest in *Bennet*, the Master, as a security for the receiver; and the executors who assigned had not bare authority, but the interest in the thing assigned, for neither residuary or specific legatees have any interest without the assent of executors.

The executor had not a bare authority, but the interest in the thing assigned, for neither residuary or specific legatees have any interest without the assent of executors.

[*240]

If good at law, the question is, whether there are sufficient grounds to set it aside in equity, so as to enable the residuary legatee to follow the assets into the hands of the assignees.

It has been admitted by the counsel for the plaintiffs, that executors may sell part of the assets, because supposed to be sold for payment of debts, and admitted for the same reason they may mortgage; but then it has been insisted, this was a security for money, *that was to come into the hands of one of the executors only*.

The distinction is extremely nice, for if he may do as he thinks fit, by selling or mortgaging of assets, how does it differ from the present case, which is an assignment by *John Mead*, in order to bring a great sum of money into his hands, and enable him to better the estate, and also to carry on with more advantage his office of executor.

Consider the cases.

I do not know any instance where an assignment has been made by an executor for a valuable consideration, that this court have set it aside, unless some fraud appears between the executor and the assignee.

Unless fraud appears between the executor and the assignee, no instance of an assignment made by him for a valuable consideration being set aside by this court.

In *Crane* versus *Drake*, 2 *Vern.* 616. the question was, whether the sale of a leasehold estate to the defendant by an executor, was good to bind an unsatisfied creditor, and a decree for the plaintiff at the Rolls, and affirmed upon appeal.

(1) *Hudson* v. *Hudson*, *ante* 1 *vol.* 461.

Upon

MEAD v. Ld. ORRERY. Upon searching *the Register's book* for that case, it appears, that it was admitted by the answer, that he had notice of the plaintiff's debt, and upon that, and the evidence in the cause, Lord *Cowper* decreed for the plaintiff, saying the defendant was a party, and consenting to, and contriving *a devastavit*.

The next was the case of *Paget* versus *Hoskins*, *Prec. in Canc.* 431. I see no grounds for Mr. *Vernon*'s dissatisfaction at the decree there *.

[241] The case of *Humble* versus *Bill & al'*, 2 *Vern.* 444. *A.* having a term in the printing-office, by will directs 2000*l*, shall be raised out of the profits for his daughter and her children, and made *B.* executor; *B.* mortgages the term: decreed the daughter and her children should redeem, or be foreclosed; *but reversed by the House of Lords* (1).

This differs extremely from the present case, because there was a charge upon a particular part of the estate for securing the sum of 2000*l.* and therefore it would have been going a great way, to say, that making a subsequent mortgage should prevail against a prior mortgagee, and, as being a charge upon the profits of a printing-office, it might, besides, produce enough in time to pay both.

A case was cited of the defendant's side, that came before me, which was *Nugent* versus *Giffard* in 1738, 1 *Tr. Atk.* 463. upon consideration of the danger of breaking in upon the power of executors; I was of opinion, that a purchaser there, under an assignment from an executor, ought to have the benefit of it: now, I do not see that this differs from the present case, only I think that was rather stronger †.

But there is something here very particular, that distinguishes it from all the cases that have or can be cited, for it is not a sole executor disposing of the assets for his own benefit, but here are three executors assigning, two of them are not interested in it, and the other is one of the residuary legatees under the will: here is an assignment dated the 21st of *December*, 1726, made upon *John Mead* the younger's being appointed one of the receivers of the Duke of *Buckinghamshire*'s estate, appears to be

* A freeman of *London*, having issue two daughters, devises 600*l.* a-piece to them, and makes his wife executrix; by an estimate it appeared that his personal estate was at his death 18,000*l.* to 6000*l.* to which the widow being intitled, *A.* her second husband, in consideration thereof, settled a jointure of 600*l.* *per annum*; afterwards a loss of 12,000*l.* befell the freeman's estate; and though the wife was dead, and it was urged that the second husband was a purchaser of her fortune, yet decreed that the daughters should have a proportionable recompence out of the 6000*l.* *Pagett* v. *Hoskins*.

† An executor assigns over a mortgage term of his testator to *A.* as a satisfaction of a debt due to *A.* from the executor; this is a good alienation, and *A.* shall have the benefit of it against the daughters of the testator, who were creditors under a marriage settlement.

At law, an executor may alien the assets of a testator, and when aliened, no creditor can follow them; and when the alienation is for a valuable consideration, this court suffers it as well as at law. *Nugent* v. *Gifford*, 1 *Tr. Atk.* 463.

(1) 1 *Bro. Par. Ca.* 71.

fairly

fairly transacted, and no colour of fraud; Mr. *Pigot* the conveyancer was the person advised with as to the manner of doing it; three executors were all of them treated with, and all of them joined in it. MEAD v. Ld. ORRERY.

It is recited, that whereas it is the proper money of *John Mead* the younger; and also recited that *John Mead*, &c. are the executors. [242]

What do these recitals import? Why, that the mortgage is the proper money of *John Mead* the younger.

It may be asked, Which way could he acquire the sole property?

As he was one of the executors, and in whose shop the money affairs were transacted, he might be a creditor for this sum by money advanced by him on account of the residue.

Or the other two executors might have released and assigned this mortgage to *John Mead*, the younger, as his share of the residuary estate of old *John Mead*; and suppose he alone had assigned this to *Bennet*, as a security for his receivership, would the other residuary legatees have been at liberty to follow it into the hands of the assignee?

I am of opinion they could not.

For otherwise it would be saying, that no man could have an assignment from executors without coming into the court of Chancery, to have an account from him how he has distributed the assets of his testator; for *notice* to the assignee, of the will, would have been equally the same in this case of an assignment of one executor, as now in the assignment of three.

To say, that the assignee ought to have looked into the account of the executorship, and given notice of it to the residuary legatees, is going too far: for how could the assignees look into the account, for they could not possibly do it without looking into the whole shop account of *Mead*, as it was mingled and confounded together.

Therefore, as this appears to be the transaction of all the executors, and two of them were not interested, and there is no colour of fraud, I am of opinion there is not sufficient grounds to set aside this assignment.

Some other circumstances have been insisted on by the plaintiff's counsel, that there was a suit at the time of the assignment about the mortgage, who was intitled to it.

I do not see how that *lis pendens* could affect this assignment, unless it had been determined this was the mortgage of *Fowle*, the partner of old *John Mead*, and belonged to his creditors, the plaintiffs in that cause.

But, as it was determined to be part of old *John Mead*'s estate, there is an end of this objection. [243]

A *lis pendens* is only a general notice of an equity to all the world, but cannot affect any particular person with a fraud, unless there was a special notice of the title in dispute there, to that person.

A *lis pendens* cannot affect any particular person with a fraud, unless he has a special notice of the title in dispute there.

There

MEAD v. Ld. ORKEY.

There are several other circumstances that do deserve to be considered on the part of the defendants.

It appears that this transaction was for the benefit of the shop, that had for several years received the rents of the estate, which was a very great advantage, and therefore for the interest of the shop, the estate should be continued there.

Consider then the reflections that naturally arise from a matter of this kind.

Old *John Mead* died in 1712, his successors carried on the business, accounts were kept in the shop, and managed as before, down to the time of making the assignment, and down to the bankruptcy of *William Mead*, the uncle of the plaintiff.

The testator's estate appears to me to be indebted to the shop; the present plaintiff came of age in 1721: the bankruptcy of *William Mead* was after the death of *John Mead* in 1727.

There is no pretence that the plaintiff claimed to be creditor under the commission for any debt due to the estate of old *John Mead*, as residuary legatee of him, but the executors of the Duke of *Buckingham* are admitted creditors for the surplus, over and above what was secured to them by the assignment of the mortgage, and no objection taken; and the plaintiffs, instead of claiming it there, come here in order to follow the assets into the hands of a purchaser for a valuable consideration.

The bill was not filed till the year 1739, a great many years since the death of old *John Mead*; at the filing of the bill, twenty seven years, and now thirty-two after it.

Thus much must be admitted by the plaintiffs, that the defendants, as executors to the Duke of *Buckinghamshire*, are intitled to what ever was the share of *John Mead* the younger, as one of the residuary legatees of old *Mead*; so that there must be an account to be taken of his share, and likewise of all old *John Mead*'s debts, which is almost impossible to be done.

[244] Upon the whole, I am of opinion, there is no pretence to set aside this assignment, as the executors had the legal right, as there is no colour of fraud, and as two of the executors, who had no interest in the assignment, joined, which they might do; and as here is a purchaser too for a valuable consideration, it ought not to be affected by an account to be taken of assets in favour of residuary legatees.

When a receiver has been appointed by this court, and he passes his accounts regularly before the Master, according to the course of the court, the sureties are bound by it.

A mortgagor in possession is not liable to account for the rents and profits to the mortgagee, for he ought to take the legal remedy to get into the possession.

As to the mortgagor, I do not know any instance where he keeps in possession, that he is liable to account for the rents and profits to the mortgagee, for the mortgagee ought to take the legal remedies to get into the possession; but as to that part of the estate which *Kirkby* dispossessed the mortgagee of, by colluding with the tenants, and prevailing upon them to attorn to him, there he ought to account, provided the estate is redeemed by him.

His

His Lordship declared first, the Master ought not to have taken a security of *John Mead* the younger, as receiver of the rents and profits of the estate of the late Duke of *Buckinghamshire*, by assignment of the mortgage, but by *recognizance with sureties*, according to the course of the court; and that he mentioned this, in order to discourage it for the future; but was of opinion, the defendants, the executors of *Edmund* Duke of *Buckinghamshire*, are intitled to the benefit thereof, as to what is due on account of *the receivership of* John Mead. MEAD v. Ld. DARBAY.

Directed the Master to examine and ascertain what was due from *John Mead* the younger, at the time of his death, which came into, and remained in his hands, as *receiver*, by virtue of the decree, and report in the former cause (1).

(1) *Reg. Lib. B.* 1744. fol. 152.

Hardcastle versus *Smithson and Slater*, *July* 1745. Case 83.

[245]

The court thought it would be going too far to over-rule the *modusses*, after the admission that tithes had not been paid time immemorial; and therefore according to the rule of the court of Exchequer in these cases directed an issue to try the *modusses*.

A Bill was brought by the plaintiff as impropriator of the rectory of *Coverham* in *Yorkshire*, for the tithe of hay-herbage, and agistment of cattle.

The defendants insist, that there are and for time immemorial have been, several ancient usages and customs within the several villages, *that all and every the occupiers of lands and tenements therein*, have used to pay yearly on *St. James's day* to the impropriator of *Coverham*, certain annual sums of thirty shillings, twenty shillings, *&c.* in lieu of all *tithe hay* yearly happening within the lands, *&c.*

The defendants insist, as to *the agistment tithes*, that there are payable, by ancient and immemorial custom and usage within the said parish, one penny half penny for each milk cow having a calf, and one penny for a cow not having a calf at *Easter* every year.

A cross-bill was brought to establish *the modusses*, and Mr. *Hardcastle* in his answer admitted, that there have been time immemorial such usages and customs, as are insisted on by the defendants to the original bill.

LORD CHANCELLOR,

Though it is true *tithes in kind* are the right of the parson, yet where there are *customary payments* in lieu of them time immemorial, it must have weight.

Tho' *tithes in kind* are the parson's right, yet immemorial customary payments ought to have weight.

The answer to *the cross-bill* admits, that these payments have been accepted time beyond the memory of man.

Every

Hardcastle v. Smithson.

Unless there are very strong reasons to overturn customary payments, the court will not easily be brought *quieta movere.*

Every purchaser who comes into the parish pays according to the rate of these payments, and buys upon the faith of them, and unless there are some strong unsurmountable reasons to overturn *these customary payments*, the court will not easily be brought *quieta movere*, and yet rules of law ought to be adhered to with regard to *modusses*.

The question is, Whether these *modusses* can be supported? And if they are established, it must be on *the cross-bill.*

They are laid in this manner, *that all and every the occupiers of lands and tenements therein, &c.* (*Vide the words before.*)

As to these *modusses* a great many exceptions have been taken.

1st, That they are unreasonable, because the *modus* is laid for the occupiers of the lands and tenements within the parish, [246] which may take in houses, wood, arable, &c. which do not pay *tithe hay*, and therefore, there is a presumption no agreement of this kind could be entered into between the parson and parishioners, and that it is in the mouth of the parson to say no such agreement could be made; and I allow, if there was a violent presumption of this kind, it would have weight.

But I think no such presumption is created here, for the lands might be presumed to be in the hands of one person at the time when the agreement was made, and if they were in the hands of several owners, they might all probably pay *tithe hay*, and therefore might agree, that they would pay so much for the *tithe of hay* whether they would have tithe of hay or not, for as they pay it at all adventures, they have the benefit of the *modus* when they have hay, and they may therefore have hay if they please; and so are the cases, 1 *Ventr.* 3, &c.

The rule of law is, that a *modus* ought to be equally certain, as the tithes in lieu of which it comes; the meaning of which is, it must be so taken to a common reasonable intent, but not to be weighed by grains and scruples.

The second objection was, that the *modus* ought to be certain in point of quantity, and in point of remedy: and in general the rule of law is, that a *modus* ought to be equally certain, as the tithes in lieu of which it comes; and is so laid down in a case in the court of King's Bench of *Startup* versus *Dodderidge*, *Salk.* 657. *that a modus ought to be as certain as the duty which is destroyed by it.*

To say it must be equally certain, does not mean that it is to be weighed by grains and scruples.

In a case in *Hob.* 39. there was a *modus* for a park of two shillings a year and a shoulder of every third deer killed in the park, which is now disparked.

Consider how uncertain this was, for the owner might kill none: and yet Lord *Hobart* was of opinion, after it was disparked the *modus* remained of two shillings a year.

I mention this to shew, that when books say that the *modus* must be as *certain*, they mean it must be so taken to a common reasonable intent.

As to the sums in the present case they are certain, but the main objection is as to *the remedy*; for it is said that the parson,

whether he sues in the ecclesiastical court, or brings his bill in equity, must make all *the occupiers, parties*, because they are jointly liable, and not severally. HARDCASTLE v. SMITHSON.

This deserves to be considered.*

The laying *of this modus*, does import that all the occupiers are liable, and it must be understood of all the occupiers of the several vills and hamlets mentioned in the defendant's answer.

It has been truly said that all these lands might originally belong to one person, and that branching it out afterwards to different occupiers *shall not alter the modus*. [247]

See the case of *Sheldon* against *Montague*, in *Hob.* 118, and *Cooper* against *Andrews*, in *Hob.* 39. as to the laying it in occupiers.

If this doctrine was to be allowed, that if a parson is under necessity of making all the occupiers parties (1), it will destroy a *modus*, it would be of very extensive consequence, and overturn great number of *modusses* in the kingdom.

The *majus*, or *minus*, the greater or lesser quantity of land does not alter the case.

So in the case of *Stopp* versus *Peacock*, 3 *Lev.* 386. the *modus* was for all the tenants and occupiers, and the court of Common Pleas, in consideration of the cases aforementioned in Lord *Hobart's Reports*, granted a prohibition.

I mention this to shew, that these *modusses* have been allowed notwithstanding the prescription has been laid in the *occupiers*, and notwithstanding it has been uncertain.

I admit that every part of the land is liable to *the modus*, so that no occupier can be discharged till the whole *modus* is paid, the ecclesiastical court would then be justified in determining that every occupier is liable *in toto*, and *in solido*.

None of the occupiers can be discharged unless *the whole modus* is paid; and it is a very reasonable ground for the court to go upon, that every occupier is liable for the whole, and for each other, and therefore suing a part of the occupiers is sufficient. If it is rested only upon the case of the bishop of *Hereford* versus *The Duke of Bridgwater*, in the court of Exchequer, I should not determine against *this modus*, without directing an issue to try it: for the cases of tithes are more frequently in that court, as they have the proper jurisdiction.

Tho' a *modus* be laid in all the occupiers, yet each is liable for the whole, so that suing a part of the occupiers is sufficient.

It came twice before the Exchequer; first, upon demurrer before Lord Chief Baron *Pengelly*, *&c.* and upon the hearing before Lord Chief Baron *Reynolds*, *&c.* and the court did not say that the *modus* was bad, but strongly inclined it was good, and were of opinion that it ought to be tried; for, said Lord Chief Baron *Reynolds*, if it was good in point of fact, he did not see why it might not be so in law.

There never was any appeal from this decree, though the tithes were of great value.

(1) *Vide Mayor of York* v. *Pilkington*, *ante* 1 vol. 283.

It

HARDCASTLE v. SMITHSON.

It is admitted by the answer to the cross-bill, that the tithes here have not been paid in the memory of man, and therefore it is too much for the court to over-rule the *modusses*.

For all the objections are equally proper to be insisted on at the trial, and to be laid before a jury, as to be insisted on here.

It is not necessary lands excepted out of a *modus* should have the same description as when the *modus* was first settled; for if they agree in point of fact, sufficient.

It is not necessary that the description of the lands, which are excepted out of the *modus*, should have the same description as when the *modus* was first settled; for if they agree in point of fact, it will be sufficient.

I am of opinion to follow the same method and rule as the court of Exchequer, and to direct a trial.

Which was directed accordingly.

Case 84. *Greerside and Others* versus *Benson and Others*, *June* 28, 1745.

S. C. cited 2 Ves. 368.

The plaintiffs were two sureties with Mrs. *Hudson* in an administration bond to the commissary of *York*, who exhibited an inventory there of the intestate's effects; the defendant *Benson*, being a creditor by bond of the intestate in the penalty of 600*l.* brought his action against the administratrix, who pleaded she had no assets *ultra* 54*l.* *Benson*, not satisfied with the inventory, procured the commissary to assign to him the administration bond, and brought three actions on it, one against her, and one against each of the sureties, and assigned for breach of the bond, that Mrs. *Hudson* had not exhibited a true inventory; no defence, and judgment by default. *The administratrix and the sureties are bound by the verdict, and no excuse, it was without defence, for that speaks a consciousness she had none; and the court ordered the verdict should stand as a security for so much as the account to be taken on the inventory should fall short to satisfy Mr. Benson's principal and interest on his bond* (1).

THE plaintiffs were two sureties with the defendant Mrs. *Hudson* in an administration bond given to the commissary of *York*, according to the statute of distributions, for her bringing in a true and perfect inventory of the intestate's effects; the defendant Mrs. *Hudson* did afterwards exhibit an inventory in the spiritual court of *York*.

The defendant *Benson* being a creditor of the intestate by bond in the penalty of 600*l.* brought an action against the defendant Mrs. *Hudson* upon that bond, and she pleaded that she had not assets *ultra* 54*l.* which she paid into court.

The defendant *Benson*, not being satisfied with the inventory brought in by her, procured the commissary of *York* (by indemnifying him) to assign the administration bond to him, and he put it in suit by bringing three several actions, one against her, and one against each of the sureties; and assigned for breach of the bond, that she had not exhibited a true and perfect inventory.

[249] These causes came on to be tried, and no defence was made by the two sureties, and there was judgment for the plaintiff by default.

(1) Vide *Ashley* v. *Baillie*, 2 *Ves.* 368. *Wallis* v. *Pipon*, *Amb.* 183.

The

The bill is brought against the defendant *Benson*, insisting that he as a creditor had no right to put the bond in suit against the sureties, according to the statute, and prayed an injunction to stay the proceedings at law. GREENSIDE v BENSON.

Mr. Solicitor General, for the plaintiffs in equity, cited the case of *The Archbishop of Canterbury* versus *Wills*, *Salk*. 315.

The question (he said) was, Whether the bond taken by the ordinary under the statute of 22 & 23 *Ch*. 2. relating to intestates' estates, is to be confined only to the exhibiting an inventory for the benefit of the next of kin, or whether it extends to creditors.

The 31 *Ed*. 3. *stat*. 1. *c*. 11. the 21 *Hen*. 8. *c*. 5. and *Ch*. 2. do not extend to residuary legatees, but is expresly tied down to *an intestacy*, so even that case is out of that statute.

As there have been cases determined already upon this point, it would be directly encountering them to say, a bond within this statute may be assigned to a creditor, and that he may assign a breach.

The bond was taken in the penalty of six hundred pounds by the creditor of the intestate, when the intestate was declining in his circumstances, and before any account was settled, so that it was not certain how much was due, and this court will not allow him to recover six hundred pounds at law, unless he can make out so much was due to him.

The administratrix has exhibited an inventory, but there is some trifling mistake in it, and she has in effect administered entirely: for she applied the assets in paying the rent her husband owed the landlord, which is at least of as high a nature as a bond, and expended no more than five pounds in the funeral, which is only three pounds more than the law allows where the deceased dies insolvent (1).

Mr. *Clark* of the same side.

The act of parliament did not intend to give the ordinary jurisdiction either in respect of funds, or persons, larger than what he had before.

The fund, over which he exercised a jurisdiction, was that which could not be appropriated to the debts.

The account was not to be litigated by any body, but was to [250] be implicitly relied on by the ordinary.

Before the act of parliament he was to deliver in an inventory when called for; but by the act of parliament he is to account by a particular time.

The third clause directs to whom the ordinary shall compel a distribution, the widow and children, and not amongst creditors, so that the defendant *Benson* has no pretence to come upon this fund.

A creditor is not within the view and intention of this act of parliament, and his proper and ordinary remedy was at law, and not in an ecclesiastical jurisdiction.

(1) *Vide Stag* v. *Punter*, *ante* 119.

GREERSIDE v. BENSON.

He cited the case of *Brown* versus *The Archbishop of Canterbury*, 1 *Lutw.* 382. *b.*

Mr. *Owen* of the same side.

Upon the creditors' application to the ecclesiastical court, they can only compel the administrator to exhibit an inventory, and whence once exhibited, the ecclesiastical court can do no more for creditors, but they must take their remedy at law.

But in the case of the next of kin, after the inventory is brought in, they can proceed in that court, and compel the administrator to distribute according to the statute.

Mr. Attorney General counsel for the defendant *Benson.*

Mr. *Benson* is a creditor of the late Mr. *Hudson* for three hundred pounds, who gave him a bond to secure it in the penalty of six hundred pounds on the 26th of *March* 1741, he left a widow the defendant Mrs. *Hudson*, who in point of law was intitled to administer.

There was an application by the defendant to let him take out administration; Mrs. *Hudson* refused, which it is probable she would not have done, but upon an apprehension there were assets sufficient to pay the debts.

He sent appraisers to appraise the intestate's goods, which they value at two hundred and eighty pounds and upwards.

This appraisement was taken some time after the widow had been in possession: she gave the common security, and the plaintiffs were her sureties.

[251] The administratrix pleaded to the defendant's action she had assets only amounting to 55 *l.* *ultra* what she had already paid.

The jury find two hundred and twenty six pounds beyond the fifty five pounds, and so he became intitled to both sums.

Doctor *Ward* the ordinary assigns the bond to the creditor, who brings an action against the sureties, and who joined issue, but made no defence, and so there was judgment for the plaintiff.

The relief prayed by the bill is, that the defendant *Hudson* may indemnify the plaintiffs for being sureties in the bond, and for an injunction against Mr. *Benson* till an account is taken between them and Mrs. *Hudson*, and till she shall have satisfied Mr. *Benson* as far as the assets will go.

He insisted that the point made by the other side, cannot arise out of this prayer of the bill.

Lord Chancellor inclined to think the general relief was inconsistent with the particular relief, but directed Mr. Attorney General to go on.

Mr. Attorney General: This is a question of great consequence, and if determined for the plaintiffs, would take away one great security the statute intended for creditors.

The first question is a mere question at law, what is the construction of the statute in regard to this bond.

They must shew some equitable principles distinct from the principles of law, for the statute has given a legal remedy, and leaves

leaves equitable remedies upon the foundation of equitable principles. *GREERSIDE v. BENSON.*

He obſerved firſt upon the words of the ſtatute, which are very clear, and ſaid there ought to be an extreme plain intent to overturn the words.

The condition of the bond is, *that the adminiſtrator do make or cauſe to be made a true and perfect inventory of all and ſingular the goods, chattels, and credits of the ſaid deceaſed, which have or ſhall come to the hands of the adminiſtrator.*

If the ſtatute had intended that a creditor ſhould not have the benefit of the inventory, why did not the ſtatute ſay it?

When words are ſo explicit and plain, they muſt make the intention of the ſtatute as clear as the ſun, before a court of equity would interfere.

The ordinary at common law might have diſpoſed of the [232] whole to charitable uſes, and could not be compelled to grant adminiſtration, or was even ſo much as obliged to pay debts; therefore the ſtatute of *Ed.* 3. and *Hen.* 8. gave him a power to grant adminiſtration, and bound him to pay debts, and for that reaſon it became extremely material for him to ſee the perſon who was to adminiſter and pay the debts.

The ordinary therefore obliged the adminiſtrator to bring in an inventory, and to ſee that it was diſtributed in payment of debts; and this was the occaſion of a number of caſes in prohibition to prevent the ordinary from applying inteſtate's effects otherwiſe than in the payment of debts.

This gave riſe to the ſtatute of 22 *Ch.* 2. relating to inteſtates' eſtates, in order to ſettle the diſpute between the eccleſiaſtical and common law courts.

Who are the perſons that are firſt and principally intereſted in the eſtate at law? certainly the creditors!

The law ſays the adminiſtrator ſhall bring in a true and juſt account.

Is not this a reaſonable uſe for the legiſlature's compelling adminiſtrator to bring in a true inventory?

He inſiſted it was more reaſonable to do it for a creditor than for the next of kin.

To ſhew this has been always the practice, what Mr. *Owen* mentions is ſtrong for the creditor, if the meaning of the act is, that a creditor ſhall not make uſe of any inventory, or be intitled to any benefit from it, they might as well in the firſt inſtance apply to a court of law for a prohibition, to prevent the creditors compelling the adminiſtrator even to bring in an inventory.

To ſay a creditor is to have a benefit from the condition of the bond, and not from the ſecurity *the penalty*, is an abſurdity.

The inventory is merely an account of the eſtate of the inteſtate, but an account before the ordinary is an account of money expended by the adminiſtrator, and how he has done it.

Q 2 LORD

GREENSIDE v. BENSON.

The commissary who is the obligee of the bond may assign a breach in not delivering a perfect inventory, and even without citation, and there must have been judgment for the ordinary.

LORD CHANCELLOR,

There is no doubt but the archbishop's commissary the obligee may assign a breach in not delivering a true and perfect * inventory, and even without citation, and nothing else appears at law, and there must have been a judgment for the ordinary, because no doubt there was a breach in not exhibiting such an inventory.

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What the counsel for the plaintiffs and for Mrs. *Hudson* aim at would have been right, supposing the ordinary Doctor *Ward* had assigned for breach the non-payment of the creditor's debts.

The ecclesiastical court understand no more by an account than some account in nature of an inventory, and depends only upon the particular wording of inventories by administrators.

The case principally relied on is the *Archbishop of Canterbury* versus *Wills*.

The ordinary cannot compel the administrator to account, but it must be *ad instantiam partis*.

The ordinary, after an administrator has exhibited an inventory, cannot compel the administrator to account, but it must be *ad instantiam partis*, and therefore the inventory and account are as to the ordinary the same thing. *Vide Wheeler* versus *Wheatley*, *December* 7, 1723, before Lord *Macclesfield*.

What the defendant Mr. *Benson* asks is, that this bond, upon which the penalty is recovered, may stand only as a security for what is justly due to the creditor.

The administratrix to be sure cannot now dispute the verdict, which finds she did not administer the whole assets, and she is bound by a verdict which has unravelled a matter, and it is no excuse to say that the verdict was without defence of the administratrix, for that is rather a consciousness that she had no defence.

Therefore the court will not think it proper to have the whole account taken over again, or to alter what has been found by the verdict.

The case of the sureties is not at all better, for, as the verdict was obtained against the administratrix, who was the proper person to try it, it would be hard to have this tried over again in as many actions as the plaintiffs please.

His Lordship ordered (1) an account to be taken only of what was exhibited upon the inventory, and the verdict to stand as a security

(1) That an account should be taken of the intestate's personal estate; and that the same should be applied, &c. " And " upon payment to the said defendant " *Benson* by the said defendant *Jane Hudson*, and the plaintiffs, as her sureties, " or any of them, of what shall be " so found due to the said defendant *Benson* for his principal, interest, and costs, *so far as the assets of the said intestate will extend*, in a due ' course of administration, at such time ' and place, as the said Master shall appoint; and if the assets shall not be ' sufficient to satisfy the whole of the ' said *principal*, and costs, then upon ' payment also by the said defendant ' *Hudson*, and the plaintiffs, or any of ' them, to the said defendant *Benson*, of ' so much of the costs of this suit, and ' the costs, which the said defendant ' *Benson* was put to in procuring the said " bond

Greenside v Benson.

security for so much as that should fall short to satisfy the defendant's principal and interest on his bond.

"bond to be delivered out to be put in "suit, and also the costs in the action "brought at law by the said defendant "*Benson* in the name of the said defendant *Ward*, as the said intestate's assets "shall not extend to satisfy, and also on "payment of his costs in this court to "the said defendant *Ward*; it is ordered, that a perpetual injunction be "awarded to stay the defendant *Ward's* "proceeding at law on the bond of the "9th of *March* 1741 (being the bond to "*Ward*) at the instance or for the benefit "of the said defendant *Benson*; but in "case what shall be so paid to *Benson* for "his principal and interest, and also for "his costs of this suit, and for his costs "for procuring the said bond of the 9th "of *March* 1741, to be delivered out to "be put in suit as aforesaid, and also his "costs in the action brought at law by "the said defendant *Benson* in the name "of the said defendant *Ward*, and also "for the costs of the said defendant *Ward* "in this court, shall not amount to the "whole of the penalty of the said bond "of the 9th of *March* 1741: Then as to "the residue of the said penalty the same "is to stand as a security for any other "of the creditors of the said intestate, "who may be intitled to the benefit "thereof, subject to the further order "of the court; and in case the plaintiffs "or any of them shall pay what shall be "so found due, for principal, interest, "and costs as aforesaid, or any part "thereof, then they are to be at liberty "to prosecute this decree against the defendant *Hudson*, in order to be reimbursed what they shall so pay; and in "case any of the plaintiffs shall pay unto "the defendants *Benson* and *Ward* or "any of them, more than a rateable "proportion, as between themselves of "what shall be found due for principal, "interest, and costs as aforesaid; then "they are to be at liberty to prosecute "this decree against the other plaintiffs, "to recover a proportionable contribution from them; but in case the "plaintiffs and the defendant *Hudson* "shall make default in payment of what "shall be found due to the defendant "*Benson* for principal and interest, *as far* "*as the assets shall extend*, in a due course "of administration, or in payment to "the said defendant *Benson* his costs of "this suit, or of such costs as he was put "to in procuring the said bond of the "9th of *March* 1741, to be delivered; "and also the costs in the action brought "at law, and of *Ward's* costs in this "court, the plaintiff's bill to stand dismissed." Injunctions to stay proceedings on the judgment on both bonds till Master's report. *Reg. Lib. A.* 1744. fol. 616.

Case 58. *Guidot* versus *Guidot*, *between the Seals*, *after Trinity Term*, 1745.

By articles previous to the marriage of *A. G.* with the plaintiff, reciting her portion to be 2800 *l.* and that the defendant, as an advancement of his brother, &c. had agreed to pay 4000 *l.* it was agreed to be laid out in the purchase of lands, or in some church, college, or other renewable lease, to be settled to the same uses as the freehold and leasehold estates, which *A. G.* was seised and possessed of, are appointed to be settled; the last limitation to *A. G.* and his heirs.

The 2800 *l.* and 4000 *l.* have never been laid out in land, but remained in money to *A. G.*'s death; he by will devised all his freehold, leasehold, and copyhold lands, lying in *Islington*, and in *Elfield* in *Hampshire*, or elsewhere, to the plaintiff for life, and after her death to the defendant and his heirs; and his personal estate, after paying his debts and legacies, he gave to the plaintiff, and made her and the defendant executors.

The 2800 l. and 4000 l. must be laid out in the purchase of lands of inheritance, or in church or leasehold, for the court was of opinion, if there had been only a general devise of his lands, this money would certainly have passed. (1).

THE bill was brought that the defendant Mr. *Guidot* may account for four thousand pounds and interest from *August* 1735, and that the defendant Mr. *Child* may account for eighteen hundred pounds and interest.

By articles made previous to the marriage of *Anthony Guidot* (the defendant's brother) with the plaintiff, reciting "her portion to be two thousand eight hundred pounds, and that the "defendant, as an advancement of his brother, and for a better "provision for the plaintiff and the issue of the marriage, had "agreed to pay four thousand pounds, it was thereby declared "and agreed, that the 2800 *l.* and the 4000 *l.* should be laid "out in the purchase of lands in *Great Britain*, or in some church, "college, or other renewable lease, to be settled to the same "uses and trusts as the freehold and leasehold estates (which "*Anthony*

(1) Money covenanted or directed by a will to be invested in the purchase of land, is considered in equity *as land* in the following instances. It passes under a devise of *lands and hereditaments*, but not under a bequest of *personal* estate. *Lingen* v. *Sowray*, 1 *P. W.* 172. *Harvey* v. *Aston*, *ante* 1 vol. 364. *Green* v. *Smith*, *ante* 1 vol. 572, and note. *Beauclerk* v. *Mead*, *ante* 2 vol. 169. *Guidot* v *Guidot*, *supra*. *Rashley* v. *Masters*, 3 *Bro. Cha. Rep.* 99. **Whittaker* v. *Whittaker*, 4 *Bro. Cha. Rep.* 31. And if not devised away, it will descend to the *heir at law*. *Edwards* v. *Countess of Warwick*, 2 *P. W.* 171. *Lechmere* v. *Carlisle*, 3 *P. W.* 211. *Cross* v. *Addenbroke*, and *Fulham* v. *Jones*, 3 *P. W.* 221. note. C. It is subject to the *curtesy* of the husband. *Sweetapple* v. *Bindon*, 2 *Vern.* 536. *Cunningham* v. *Mooby*, 1 *Vef.* 176. It is not considered as assets to satisfy *simple contract* debts. *Trelawney* v. *Booth*, *ante* 2 vol. 307. *Whitwick* v. *Jermin* cited in *Baden* v. *Pembroke*, 2 *V.* 58. Where it is charged with legacies, equity construes those legacies as charged upon a real estate. *Pulien* v. *Ready*, *ante* 2 vol. 590. *Attorney General* v. *Mitner*, *ante* 112, 114. It is observable likewise, that a *feme covert* cannot pass her interest therein, unless she be present in court and examined, as a feme covert is upon *a fine*; in which case equity will decree the money instead of the land. *Oldham* v. *Hughes*, *ante* 2 vol. 453. But where a *recovery* is necessary to bar the remainders over, there equity will not decree the *money* to the tenant in tail, but will direct the same to be invested in the purchase of lands, in order to give the remainder-man his chance. *Collet* v. *Collet*, *ante* 1 vol. 11. and the note thereto. As to what shall amount to an *election* in the person, who is intitled to the absolute interest, to take it as *land* or *money*; see *Crabtree* v. *Bramble*, *post.* 680

" *Anthony* was seised and possessed of) are appointed to be set-" tled (1), the last limitation to *Anthony* and his heirs, and until a purchase could be had, in trust for the trustees to " put out the said money upon mortgages, or on government or " other securities, and to apply the produce as if lands had been " purchased."

The 2800 *l.* and the 4000 *l.* have not been invested in the purchase of any freehold or leasehold lands, but the same remained in money to the death of *Anthony Guidot*.

" *Anthony Guidot* by his will devised all his freehold, leasehold, " and copyhold lands lying in *Islington*, and in *Elsfield* in *Hampshire*, or elsewhere, to the plaintiff during her life, and after " her death to the defendant *Guidot* and his heirs; and as to " his personal estate of what nature and kind soever, he gave " the same to the plaintiff, paying his debts and legacies, and " made her and the defendant *Guidot* his executors."

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The plaintiff insisted that the 2800 *l.* and 4000 *l.* ought to be taken to be part of the testator's personal estate, and that she is intitled thereto as part of *the residuum* of such personal estate bequeathed to her by the testator's will, and that the defendant *Guidot* had no power to make any purchase with these two sums, it not being the intent of the articles.

The defendant *Guidot* (2) submitted to the court, whether the 2800 *l.* and 4000 *l.* being a marriage portion articled to be laid out in land, is not in this court considered as land, and consequently does not belong to the plaintiff, nor is included in the bequest of personal estate; and likewise leaves it to the judgment of the court, whether these sums ought not to be laid out in the purchase of lands, and settled to the uses of the marriage articles and will.

The counsel for the plaintiff cited *Soresby* versus *Hollings*, *August* 6, 1740, and 1 *P. Wms.* 172, and *Mallabar* versus *Mallabar*, *Cases in Chan. in the time of Lord Talbot*, 78, and 1 *Rolls* 725, and *Curling* versus *May*, *Mich. term* 8 *Geo.* 2. before Lord *Talbot*; the last case with an intent to shew, that when it is doubtful, whether it ought to be considered as money or land, this court will not interfere; and they stated it thus:

A. gives 500 *l.* to *B.* in trust, to lay it out in the purchase of land, or on good securities, for the separate use of his daughter, her heirs, executors and administrators; she died without issue, before the money was vested in a purchase; on a bill brought for the money against the heir of the wife by the husband, it was decreed to him, as it was originally personal estate, and the testator's principal intention with regard to it not to be collected from the will.

" *A.* gives five hundred pounds to *B.* in trust that *B.* should " lay out the same upon a purchase of lands, or put the same " out on good securities for the separate use of his daughter *H.* " (the plaintiff's then wife) her heirs, executors and administra-" tors, and died in 1729. In 1731, *H.* the daughter died with-

(1) The limitations of which were to *Anthony* for life, remainder as to a rent charge to plaintiff for life, remainder to the issue of the marriage, remainder to *Anthony* and his heirs.

(2) Who was heir at law to *Anthony*, who died without issue.

Guidot v. Guidot.

"out issue before the money was vested in a purchase; the husband as administrator brought a bill for the money against the heir of *H.* and the money was decreed to the administrator, for the wife not having signified any intention of a preference, the court would take it as it is found; if the wife had signified any intention, it should have been observed, but it is not reasonable now to give either her heir or administrator, or the trustee, liberty to elect; for Lord *Talbot* said, it was originally personal estate, and yet remained so, and nothing could be collected from the will, as to what was the testor's principal intention."

Mr. Attorney General cited for the defendant the case of *Linguen* v. *Souray*, *Prec. in Chan.* 400. and 1 *P. Wms.* 172.

LORD CHANCELLOR,

The question is, Whether these two sums are to be considered as money or land; I see but very little doubt in this case (and stopped Mr. Attorney General from going on for the defendant).

[256] The articles say, it shall be laid out in the purchase of lands of inheritance, or in church, and leasehold.

Then the court must take it to be the one or the other; and during the life of the husband and the wife, if laid out, it must have been in one or the other.

No sort of election was made by the husband (1); then at the time of the will, and his death, it stood in equity as it did in the articles, either to be laid out in freehold or leasehold: and therefore this court will call it one or the other, according to the rule in equity, *that what is agreed to be done, must be considered as done.*

If it had not been for the locality, estates in *Middlesex* and *Hampshire*, no doubt could have arisen; but then follows, or *elsewhere*, which is the most comprehensive word he could have used.

It is said the lands do not lie any where, for they are not yet purchased.

Such a devise as the testator has made here will pass every thing he has, and money by the *transmutation* of this court is changed into land.

When people make such descriptions as the testator had done here, they intend to pass every thing they have in the world; now the money is somewhere, and that by *the transmutation* of this court is changed into land.

Money is, in *England*, like *bona notabilia* in the ecclesiastical court, which must be either in the diocese of the bishop where the person dies, or in the diocese of the metropolitan, if he was possessed of money in different places; so here it is either in money, or a mortgage, and therefore the word *elsewhere* certainly takes it in.

(1) 1000*l.* (part of the trust monies) was laid out upon a mortgage in *Anthony*'s name.

Then

GUIDOT v. GUIDOT.

Then I must consider it as laid out in one or the other: *Linguen* versus *Souray* is a case in point, for there was as much an objection upon the locality as in the present.*

I declare that the 2800 *l.* and 4000 *l.* under the articles ought to be laid out in the purchase of lands of inheritance, or in church and leasehold (1); for if there had been only *a general devise* of his lands, this money would certainly have passed.

* By marriage articles 700 *l.* being the wife's portion, together with 700 *l.* to be added to it by the husband, was agreed to be laid out in the purchase of lands, to be settled in strict settlement, with remainder in the usual form to the heirs of the husband; before any purchase made, the husband dies without issue, having first devised his personal estate, which was of greater value than 1400 *l.* but without taking notice of it, to his wife, and his real estate to his two nephews, one of whom was his heir at law, this money shall in a court of equity be looked upon as land, and the devise to the wife, which was of greater value, as a satisfaction thereof. *Prec. in Ch.* 400.

(1) "And that the same and all interest passed by the said devise made "in the said testator's will of *all his* "*freehold and leasehold lands, tenements,* "*and hereditaments.*" *Reg. Lib. A.* 1744. fol. 651.

Castledon versus *Turner*, *July* 27, 1745. Case 86.

[257]

W. bequeaths his lands to his wife for life, and after her decease to *M. D.* niece to his wife, and says, *Item*, I give the use of 500 *l.* stock for *her* natural life, but after *her* decease, I give the 500 *l.* among my wife's brothers and sisters. *The wife, and not the niece, is intitled to the 500 l. stock for life.*

WILLIAM *Wetherby* by his will says, I bequeath my lands to my wife *Alicia* during her life, and after her decease I give the lands to *Margaret Dinton*, niece to my said wife; *Item*, I give the use of five hundred pounds stock for and during *her* natural life, but after *her* decease, I give the five hundred pounds among the brothers and sisters of my said wife.

Mr. Solicitor General for the plaintiff the niece, who claimed five hundred ponnds, said, that parol evidence cannot be admitted here to explain the testator's intention, according to Lord *Cheney*'s case in 5 *Co.* 68.

The words in this will are equally applicable to one person as another, and not sufficiently certain that it belongs to the wife or niece.

It has been determined where there are introductory clauses with the word *item*, they are considered as absolute clauses.

Niece to the wife, is only descriptive of the person, and therefore in grammatical construction the wife is not the last antecedent; and as it can be conjectural only that he meant the wife, the court cannot determine wills upon conjecture only, but must be void for the uncertainty.

In *Cheney*'s case, a devise to the son of a person, and he had two sons, held to be void for the uncertainty.

Mr. Attorney General, counsel for the wife, argued, that from the beginning to the end of the will, there is not one word but what is applicable to *niece, or wife.*

Her

CASTLEDON v TURNER.

Her is a relative word, and muſt refer to ſome perſon who was mentioned before.

It has been ſaid it cannot mean the wife, becauſe ſhe is not the laſt antecedent; and I am ſure as to the niece it may be as well to a ſtranger.

But I apprehend *her* throughout is applicable to the wife; he cited the caſe of *Tomkins* verſus *Tomkins* (1), lately before Lord *Hardwicke*; there was a deviſe of 50*l.* a-piece to *three* children of *A.* and *A.* had four, and his Lordſhip decreed 50*l.* to each of the four children of *A.* notwithſtanding.

[258] Mr. *Weldon* of the ſame ſide cited *Hodgſon* verſus *Hodgſon*, 2 *Vern.* 593.

LORD CHANCELLOR,

If there is an abſolute want, or omiſſion of a deviſee in a will, there no parol proof can be admitted.

Mr. Solicitor General's reply.

Mr. Attorney ſays, that the court muſt determine whether it is one or the other by a probable conjecture.

I differ with him as to the rule of evidence; and upon ſtandard rules laid down in *Cheyney*'s caſe, *he* ſhall have it whom the teſtator intended ſhould have it, and not being certain whom he intended, it was held to be void.

There has been no authority cited to impeach this rule.

The caſe of *Tomkins* verſus *Tomkins* is not parallel.

For it did not fix which of the three children ſhould take, but that the word *three* was ſurpluſage; and the court determined the teſtator miſtook the number, and that the bequeſt was fifty pounds a-piece to the children.

That *Item* is introductory of a new clauſe, and divides, ſo far from connecting it with the precedent.

Suppoſe it had been for natural life only, who could it be conſtrued to mean then? The addition of *her* only ſhews he meant a woman inſtead of a man.

LORD CHANCELLOR,

Where there is no deviſee named, this is an abſolute omiſſion, and cannot be ſupplied by parol evidence.

I am of opinion this is ſuch an omiſſion as is not proper to be ſupplied by parol evidence; for notwithſtanding, where a perſon has two ſons of the name of *John*, it may be ſupplied, yet not where there is an abſolute omiſſion (2).

Then it muſt be determined by the conſtruction of the will, and there is no rule of law that prevents it from being ſhewn by the conſtruction of the will itſelf.

Firſt, Conſider it upon the clauſe, *Item*, I give the uſe of 500*l.* ſtock for and during her natural life, &c.

[259] It has been rightly admitted on the part of the plaintiff, that the words for *her* natural life do import he meant ſome woman or other.

(1) S. C. cited 2 *Veſ.* 564. *Vide etiam Sleech* v. *Thorington*, 2 *Veſ.* 564. *Stebbing* v. *Walkey*, 2 *Bro. Cha. Rep.* 85.

(2) *Vide Baylis* v. *Attorney General*, *ante* 2 vol. 239. *Ulrick* v. *Litchfield*, *ibid.* 372.

Then

Then consider the word *her*, it must be a word of reference, and but two persons are named in the will; if right in my first reasoning, it must mean either wife or niece; to be sure *her* does not name the person, then shall it refer to the wife or niece? GASTEDON v. TURNER.

Though the testator has said no more than *her*, I am clearly of opinion for the wife; for the wife is the last mentioned and the last antecedent.

The intention of the testator is plain, he had no relations of his own for whom he had any regard, and therefore considered her relations as his own.

Would it be natural to make him prefer the wife's niece before the wife herself?

It is true the words *to her use* are left out in the beginning of the first clause; but I am not satisfied the word *Item* must be construed as independant of the preceding clause.

It is not necessary the word *Item* in a will should be construed as independent of the preceding clause.

Put it into *Latin do uxori meæ* the lands and houses, and then afterwards *do & lego* the five hundred pounds stock, the latter words would have been clearly in that language carried back to the former words *my wife*

The manner of the disposition under this will must be taken notice of; who is the testator principally taking care of for her life? why, the wife.

The wife was the person the testator was principally taking care of, and therefore she is naturally meant by the word *her*.

He must naturally mean her for whom he had before been securing the lands for life.

The word *her* in every part of the will besides means the wife, considered her as the woman he was taking the most care of, and had her in his view, κατ' ἐξοχὴν.

Therefore, I am of opinion the wife is entitled, and decreed accordingly (1).

(1). *Reg. Lib. A.* 1744. fol. 646.

Lucas versus *Evans*, *August* 6, 1745. Case 87.

[260]

A. By his will gives to the defendant his with the whole surplus, but if she should marry again, then that he should quit and deliver up half of the surplus of his personal estate to the plaintiff, the testator's brother, and his heirs, and that he shall call her to an account for the same.

A. gives his wife the whole surplus of his personal estate, but if she marries again, then she is to deliver up half to his brother, and his heirs: A bill brought to discover whether she is married; she demurred to the discovery, as it would subject her to a forfeiture. *This being a conditional limitation over of an estate, she must shew she has performed the condition; and the demurrer was over-ruled.*

Lucas v. Evans.

The bill was brought in the present case for an account of the moiety, and for a discovery whether the defendant was married again.

The defendant demurred to the discovery, as not being obliged to discover what would subject her to a forfeiture.

The defendant's counsel cited *Monins* v. *Monins*, 2 *Ch. Rep.* 68. and *Chancy* v. *Tabourdin*, before Lord *Hardwicke*. (2 *Tr. Atk.* 392.)

Lord Chancellor,

The case of *Chancy* v. *Tabourdin* was expresly a forfeiture of the whole portion, and there the testator was a father, who is bound by nature to provide for a child.

But, consider this case, where the testator gives a wife the whole surplus of his personal estate, if she does not marry again; but if she does, he limits over one moiety to his own brother, and directs that she shall account for it to him.

Then consider the provision that he was making for every branch of his family; it is within the rules and distinctions in former cases; where it is a conditional limitation over of an estate, there the person must shew that they have performed the condition, and cannot demur to a bill for a discovery of it; *the demurrer was over-ruled* (1).

(1). *Chancey* v. *Fenhoulet*, 2. *Ves.* 265. *Boteler* v. *Allington*, post 457.

Case 88. *Pearly* vesus *Smith* (1), *October* 22, 1745, *among the Cause Petitions.*

A. had an interest in new *South-sea* annuities during his life, and dies before the *Christmas* half-year becomes due; *the purchaser of* A.'s *interest in his life-time in these annuities, is not entitled to the* Christmas *dividend.*

A Purchaser from an husband of an interest in new *South-sea* annuities during his life, remainder to other persons, (which had been originally secured upon a mortage, but by order of this court had been transferred to government securities) insisted, that notwithstanding the husband died before the *Christmas* half year became due, yet that he was entitled to be * paid proportionably, at the rate of four *per cent.* for the time the husband lived, from *Midsummer* to the day of his death.

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Had it continued a mortgage, the purchaser would have been intitled to his demand, for there interest accrues every day for forbearance of the principal.

Lord Chancellor,

If it had continued a mortgage, the purchaser would have been intitled to the demand he now makes, because there interest accrues every day for forbearance of the principal (2); though notwithstanding it is usual in mortgages to make it payable half-yearly.

(1). *Reg. Lib. B.* 1744. fol. 477.

(2). 2 *Ves.* 673. *Edwards* v. *Countess of Warwick*, 2 *P. W.* 176.

But

PEARLY v. SMITH.

South sea annuities are by act of parliament considered merely as such, and are exactly in the case of a common one, payable half-yearly, where the annuitant dies before the half-year is completed.

But *South-sea* annuities are by act of parliament considered merely as annuities, and therefore the purchaser here is no more intitled to receive the half year's dividend which did not become due till after the husband's death, than he would in the case of a common annuity payable half-yearly, where the annuitant (in whose place he stands) dies before the half-year is completed (1).

(1) So *Sherrard* v. *Sherrard*, *post* 502. 279. S. C. *Rashleigh*, v. *Masters*, 3 *Bro.* *Wilson* v. *Harman*, 2. *Ves.* 672. *Amb.* *Cha. Rep.* 101.

Toomes versus *Conset*, *October* 25, 1745. Case 89.

A lease of 60 years, which had been granted a collateral security to a recognizance, for 3500*l.* being expired; the plaintiff by his bill prayed to be let into possession, and that the security might be vacated, or satisfaction entered on record. *The account directed to be taken of the rents which have accrued since the expiration of the lease, and received by the defendant, and to be deducted out of the principal, interest, and costs, and the plaintiff decreed to be intitled to a conveyance of the inheritance of the estate in question, and possession on payment of what shall be found due.*

THE end of the plaintiff's bill was, to be let into possession of the premisses in question; a lease of a term which had been granted for 60 years, as a collateral security, being expired; and that he may have a reconveyance of the said premisses, and that the recognizance the security for the 3500*l.* the money borrowed, may be vacated, or satisfaction thereof acknowledged upon record.

LORD CHANCELLOR,

This court will not suffer, in a deed of mortgage, any agreement in it to prevail, that the estate become an absolute purchase in the mortgagee upon any event whatsoever; and the reason is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is too inclinable to submit to any terms proposed on the part of the lender.

This, it is insisted, is become irredeemable by the length of time, and other considerations.

The court makes a distinction in the case of [co]*llateral security*, to indemnify a person in the purchase of a term.

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These collateral securities lie out a great length of time, and there is not the same inconvenience as where a person has been for a long time in possession of the mortgaged premisses, and a difficulty arises in taking the account; here there is no difficulty, for the account to be taken is only since 1739, after the term of sixty years was expired, and also another term of twenty-one years, and as the possession of the premises could not be come at till the effluxion of these terms; they might conclude that the collateral security extended to the term of sixty years, till they had consulted with counsel.

No bill has been brought to compel them to redeem, or foreclose.

Lord *Hardwicke* declared, that the plaintiff was intitled to a conveyance of the inheritance of the estate in question, and to the possession thereof, upon payment of what shall be found due; and directed the master to take an account of the rents

TOOMES v. CONSET.

of the premisses in question, which have accrued since the expiration of the lease of the 6th *November* 1658, and been received by the defendant, and that what shall be coming on account of the rents, be deducted out of what shall be found due for principal, interest, and costs.

Case 90. *Jesus College* versus *Bloom*, *Michaelmas Term* 1745.

S. C. [illegible] 1 Ves. [illegible] S. C. Amb. [illegible] post 756. Bill for a satisfaction for waste in cutting [illegible] done before the assignment; a b[illegible]

THE bill was brought to have an account and satisfaction for waste, in cutting down trees, against the defendant, an assignee of the lessee of the college, after an assignment of term, and for the waste done before assignment.

[illegible]inst an assignee of the lessee of the college, after the assignment, and for waste [illegible] after the estate of [illegible], that cut down the timber, is determined by assignment [illegible] be entertained merely for satisfaction, without praying an injunction.

LORD CHANCELLOR,

Upon the opening of the case, the bill seems improper, and an action of trover is the remedy.

Where the bill is for an injunction, and waste has been already committed, the court, to prevent a double suit, will decree an account, and satisfaction for what is past.

So, upon bills for discovery of assets, the court will decree an account, which the party is entitled to here, and is incident to the other relief.

[263] Let precedents be searched, for if there are any, I will follow them, but if none, I will not make one; his Lordship adjourned it to the first day of causes after term; and upon that day, Mr. *Hoskins* cited for the plaintiffs, 1 *P. Wms.* 406. *Bishop of Winchester* versus *Knight*, and 1 *P. Wms.* 240. *Whitfield* versus *Bewit*.

LORD CHANCELLOR,

The first question is, whether bills ought to be entertained merely for satisfaction for timber cut down, after the estate of the tenant that cut it down is determined, by assignment, or otherwise, without praying an injunction.

I am of opinion they ought not.

Waste is *a tort*, and the remedy lies at law.

In waste, the place wasted is recovered; in trover damages.

In an action of waste, the [illegible] wasted is recovered; in an action of trover, *damages*.

To stay the waste, and not by way of satisfaction of damages, is the ground of coming into this court.

The ground of coming into this court is, to stay the waste, and not by way of satisfaction for the damages, but by way of prevention of the wrong, which courts of law cannot do in those instances, where a prohibition of waste will not strictly lie.

But in all these cases, this court has gone further, merely upon the maxim of preventing multiplicity of suits, which is the reason that determines this court in many cases.

As in bills for account of assets, &c. that originally was only a bill for discovery, which cannot be had without an account, and therefore the court will make a complete decree and give the party his debt likewise.

JESUS COLLEGE v. BLOOM. The court now make a complete decree in bills for an account of assets by giving the party his debt likewise.

So, in bills for *injunctions*, the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here.

On bills to stay waste, the court will make a complete decree, and give the party injured a satisfaction.

But nothing would tend to greater vexation, than to admit of such bills as the present, after the term is at an end (1); and I am glad to find their is no precedent.

It does not appear in the case cited out of 2 *P. Wms.* that no injunction was prayed, I believe there was, and if so, it is the common case.

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It is, besides, different from the present, because the plaintiff there was only intitled to a moiety of the mines, and of the timber, which was the principal matter, and therefore an account was necessary.

The other case was the case of a mine, which is a sort of trade, and an account was therefore necessary (2); and there are many cases, where this court have made decrees in the cases of mines, which they could not have done in cases of timber.

Many instances where the court have decreed an account in the case of mines, which they would not have done in the cases of timber.

Therefore the present case is reduced to this, that it is a bill brought by the college, to have an account (after the determination of the tenant's estate, he having assigned) of a little timber cut down, without praying an injunction; and I think it is such a bill as the court ought not to entertain.

The next question is, as to costs; and I am of opinion, as the plaintiff is not barred of his remedy at law, he ought to pay costs: besides, what the bill is brought for, is of so small value, as to be beneath the dignity of the court.

Another reason is, that this suit might have been brought in the court of grand sessions in *Wales*, which has been often held, and this is a strong reason for discouraging bills here; therefore, let the bill be dismissed with costs, but without prejudice to any remedy the plaintiff may have at law.

Where the suit might have been brought in the grand sessions of *Wales*, it has often been the reason for dismissing bills here.

(1) *Vide Smith* v. *Cooke, post* 381. (1) *Vide Story* v. *Lord Windsor, ante* 2 *vol.* 630.

Case 91. *Loyd* versus *Griffith*, *January* 17, 1745.

The Master being of opinion, that covenants, in a conveyance by counsel for a purchaser, were unreasonable, and ought to be struck out; and having inserted a covenant only against the seller's own acts, and reported, he approved of the draft as it now stands: The court, on exceptions to the report, directed the master to alter his draft, by inserting proper covenants from *W.* against her own acts, and the acts of *L.* her devisor, as to so much as she will be benefited by the estate devised.

MR. *Loyd*, who died in 1738, had conveyed his estate in *Shropshire* to Mr. *Hill*, for securing twenty-three thousand pounds; the same year, he charged his estate in *Shropshire*, and his estate in *Anglesea*, with two thousand pounds more, and the estates to stand as a security for twenty-five thousand pounds.

By two several settlements, executed by Mr. *Loyd*, a considerable time before his death, in consideration of fourteen thousand pounds, he conveyed his *Shropshire* estate to Mrs. *Hester Webb*, in fee.

By deed-poll, he released her from the payment of fourteen thousand pounds.

[265] Afterwards, by his will, reciting the two settlements on Mrs. *Hester Webb*, and the deed-poll, he ratifies and confirms *the said settlements* and *release to her*; and then devises to two trustees, and their heirs, all his manors, lands, &c. in the isle of *Anglesea*, and county of *Carnarvon*, to the intent that they, or the survivor, &c. shall, with all convenient speed, after his decease, out of the rents of his said estate, or by selling or mortgaging the same, or by all or any the ways or means aforesaid, raise such sum as shall be sufficient to discharge the mortgage of the lands already settled on Mrs. *Webb*, as well as all other my just debts, and after the same shall be so paid, he gives the same manors, &c. to his natural son, and his heirs; one of the trustees is dead, and the other has renounced, and administration, with the will annexed, is since granted to *Francis Newton*.

The plaintiff, the natural son, has brought his bill to carry the trusts of the will into execution, which were decreed accordingly, and referred to Master *Bennet* to take an account of the personal estate, and of the testator's debts, and the personal estate to be applied in payment of the debts, in a course of administration; and if the personal estate should not be sufficient, the deficiency directed to be made good out of the real estate devised to the trustees, and if the rents and profits of the real estates were not sufficient, then the said estates so devised to the trustees, or a sufficient part, should be sold to the best purchaser to be approved of by the Master, in which sale all proper parties were to join, and the money arising by such sale to be applied to satisfy such of the testator's debts as the personal estate and rents would not satisfy.

Pursuant to several advertisements for sale, Mr. *Andrews* was allowed by the Master to be the best purchaser of the *Anglesea* and *Carnarvon* estates devised to the trustees, at the sum of twenty-seven thousand pounds; the report was confirmed, and the purchase

chase money paid into the bank, and he has approved of the title, and M. *Andrews* has been let into possession of the estates purchased, and a draft of the conveyance has been prepared by the purchaser's counsel, with covenants against their own acts respectively, from *Hill* the mortgagee, Sir *Edward Leighton*, surviving trustee in the will, *the two trustees* appointed by the decree in the room of Sir *Edward Leighton*, from Mr. *Loyd* the plaintiff, and from *Francis Newton*, administratrix, with the will annexed, and with covenants from Mrs. *Hester Webb*, as follow, "that Mr. *Hill*, and the several persons above mentioned, have, "or some of them have, at the sealing and delivery of these presents, full power and authority to grant to the purchaser and "his heirs, the estates in *Anglesea* and *Carnarvon*, and that the "said Sir *Edward Leighton*, &c. have a right to sell the same to "the purchaser and his heirs."

She is made to covenant likewise, for quiet enjoyment, without any interruption by Hill, *&c. and by herself, or by any of them, or by any other person or persons lawfully claiming, or to claim by, from, or under them, or any of them, or by, from, or under the said* Thomas Loyd, *deceased,* Pierce Loyd, *father of the said* Thomas Loyd, *deceased,* Pierce Loyd, *grandfather of the said* Thomas Loyd, Pierce Loyd, *great grand father,* Pierce Loyd *great great grandfather, or any of them, and that freely and clearly exonerated,* &c. *or by the said* Hester Webb, *her heirs,* &c. *and from time to time to be well and sufficiently saved harmless from all manner of former and other gifts,* &c. *and from all other estates, title, incumbrances,* &c. *made,* &c. *by Mr.* Samuel Hill, *&c. parties hereto, or by the said* Thomas Loyd, Pierce Loyd *his father,* &c. or any of them, or by any other person or persons lawfully claiming any estate, right, &c. in, to, or out of the premises, by, from, or under, or in trust for them, or any of them, and likewise covenants, that the parties hereto, *viz. Hill,* &c. and all persons claiming from them any estate in the premisses, or from *Thomas Loyd*, and so on, to his great great grandfather, shall do any further act for assuring, &c. [266]

Mr. *Weldon* perused the draft on the part of the grantors, and was of opinion, that Mrs. *Hester Webb* need not be a party granting, or that Mr. *Hill* should be said to convey at her request, but, at most, only with her privity and consent, nor that she could covenant for the title, or for quiet enjoyment, or for further assurance, and struck those covenants out of the draft.

Mr. *Booth* differed in opinion with Mr. *Weldon*, and declared the draft should be restored as it stood before.

The Master being attended on the draft of the conveyance, referred the same for the opinion of Mr. *Lane*, who was of the same opinion with Mr. *Weldon*.

The Master being again attended, was of opinion, that the covenants from Mrs. *Webb* were unreasonable, and ought to be struck out, and *therein inserted a covenant against her own acts only*; and on the 17th of *August*, 1745, made his report, that he approved of the draft of a conveyance between the parties of the estate in question, as it now stands altered.

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But the purchaser not being content with the Master's opinion, a case was prepared by his orders, and laid before *Fazakerley*, who was of opinion, that a court of equity would not compel Mrs. *Hester Webb* to enter into these covenants, as she is not entitled to the deeds and writings relating to these estates.

The purchaser took the following exception to the draft of the conveyance as settled by the Master.

[267] "For that the covenants contained in the said draft of "the conveyance, mentioned in the report, from Mrs. *Hester* "*Webb*, for the title, for quiet enjoyment, and for further "assurance on her part, are struck out of the draft of the "said conveyance; whereas the purchaser insists, that the Mas-"ter ought to have let the said covenants from Mrs. *Webb* have "stood in the draft, or at least, *the purchaser ought to have* "*had such covenants inserted therein, as would have indemnified* "*him against any latent incumbrances made by* Thomas Loyd, or "his ancestors, to the amount of so much money as the said "*Hester Webb* should receive a beneficial interest from, in the "estate in question."

Mrs. *Hester Webb* did not appear by counsel, as not being a party to the suit.

The exception came on to be heard this day.

LORD CHANCELLOR,

A great number of sales are directed by a decree of this court where there are no covenants at all.

Where the vendor claims immediately under the person who bought the estate, there he need not covenant any further back than from that person, for the buyer has the benefit of the covenants in the conveyance to that person at the time he purchased.

It has been said by the purchaser's counsel, that Mrs. *Hester Webb* must covenant against all the ancestors of *Thomas Loyd*, because it is a rule among conveyancers, where an estate has been long in a family, that the vendor's covenant must go as far back as the first purchaser of the estate; but where the vendor claims immediately under the person who brought the estate, there he need not covenant any farther back, than from that person, because whoever buys this estate has the benefit of the covenants in the conveyance to the vendor's purchaser.

I never heard, nor do I know of any such rule.

Conveyances made under a decree of this court, are to be settled by the like rule as men of judgment among conveyancers would direct.

Where conveyances are to be made by a decree of this court, the settleing them, to be sure, is to be by the like kind of rule as men of judgment among the conveyancers would direct.

I cannot make an order upon Mrs. *Hester Webb* to execute any conveyance because she is no party in the cause, and therefore if it cannot be finally settled to the satisfaction of all parties, the purchaser must be discharged, but then the purchaser by way of compensation must have all his costs.

I will consider the covenant itself.

[268] Of opinion that carrying the covenant no further back than to the person under whom W. claims is sufficient.

That Mrs. *Hester Webb* should covenant, all the ancestors of her devisor, &c. (*see the words in the conveyance settled by the pur-*

chaser's

chaser's counsel), would be carrying it too far, for it would be unreasonable to extend it to the first purchaser, where a family have been for several generations in possession of the estate, for they may have had the benefit of the statute of limitations and other bars in their favour, and therefore carrying it no far her back than to the person under whom Mrs. *Webb* claims is sufficient, and the counsel for the purchaser now say they are contented with it.

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It is not a devise to her, but to trustees for the payment of debts, the material part of which is an incumbrance by mortgage on the estate given to her after his debts are paid.

But it has been insisted by the purchaser's counsel, that it enures to the benefit of Mrs. *Webb*, because the trustees have no beneficial interest nor the mortgagee, and consequently Mrs. *Webb* the *cestui que trust* has, and therefore the Master has gone so far as to be of opinion, that she ought to join in the conveyance by making her a grantor.

As she is to join, the question will be, how far she is to covenant?

There are undoubtedly a great many cases in this court, where a person covenants no farther than their own acts; as where an estate is decreed to be sold for payment of debts, and no surplus remains, the court will not require the heir to covenant any farther than his own acts; the same rule as to a devisee.

Where an estate is decreed to be sold for payment of debts, and no surplus remains, the heir need not covenant any further than his own acts; same rule as to a devisee.

But suppose such a sale was decreed, and after sale a considerable surplus comes to the heir at law or devisee, I believe there are several instances where they have been directed to covenant in the case of the heir, that neither he, nor the immediate ancestor under whom he claims; and in the case of the devisee, that neither he nor his devisor have done any act to incumber.

But where the surplus is considerable, the heir must covenant that neither he nor his immediate ancestor, and in the case of the devisee, that neither he nor his devisor have done any act to incumber.

A good deal depends upon the *quantum*; for if the purchase money arising from the sale of the *Anglesea* and *Carnarvon* estates is twenty-seven thousand pounds, and Mrs. *Webb* draws out twenty-five thousand pounds for the exoneration of the mortgage upon the estate devised to her, she may be said to be a devisee of that estate.

But if there are other debts besides the mortgage to be paid, that are a charge upon that estate, then she cannot properly be said to be the devisee of the whole of that estate, but of so much as is left after the debts are paid.

Lord Chancellor proposed to refer it to some eminent conveyancer, to consider whether the covenant required of Mrs. *Webb* is an usual covenant, but her counsel refusing, made the following order. [269]

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Let the exception be allowed, and let the Master alter the draft of the conveyance prepared and certified by him, by inserting therein *proper covenants from Mrs. Hester Webb against her own acts, and the acts of Mr. Thomas Lloyd* her devisor, as to so much as she will be benefited by the estate.

Case 92. *Gyles* versus *Wilcocks, Barow and Nutt* (1).

ON *March* the 13th, 1740, this cause, by order of Lord *Hardwicke*, stood at the head of the paper of that day, when he directed the bill against the defendant *Nutt* to be dismissed without costs, and as between the plaintiffs and the defendants *Wilcocks* and *Barlow*, by consent of the plaintiff *Gyles*, present in court, on behalf of himself and the other plaintiffs, and by consent of the defendant *Wilcocks* present in court, and of Mr. *Hodgson* of counsel with the defendant *Barlow*, all matters in difference between the said parties in this cause, were by his Lordship referred to the award and determination of Mr. *Cay* and Mr. *Thomas Stephens*, and they were to make their award therein on or before the first day of *Trinity* term next; and in case they could not agree therein, they were to name an umpire, who was to make his umpirage on or before the first day of *Michaelmas* term next; and such award or umpirage was directed by his Lordship to be performed by the said parties, and to be made an order of this court; and no bill in any court of equity was to be brought against the said arbitrators, or umpire, and the injunction was ordered to be continued in the mean time.

(1) S. C. *ante* 2 vol. 141.

Case 93. *Pack and Others* versus *Bathurst, July* 1745.

THE bill was brought for an account of the personal estate of the testator *Edward Bathurst*, and that it might be applied in a course of administration towards payment of the plaintiff's creditors, and in case the same should be insufficient for that purpose, that an account might be taken of the rents of the real estate of the testator, and so much sold as might be applied in satisfaction of the debts of the plaintiffs.

One point in this cause was, Whether a power to charge a sum of money, *viz.* 5000*l.* on land either by deed or will, and

A. had a power to charge a sum of money on land, by deed or will, and executes it by a voluntary deed; the court in favour of the creditors of *A.* will consider it as personal assets, and lay hold of it for their benefit (1).

(1) *Vide Bainton* v. *Ward, ante* 2 vol. 172, and the cases there cited in the note. *Troughton* v. *Troughton, post.* 656.

which

which had been executed by a voluntary deed of the 16th of *August* 1738, should be considered as personal assets; and a case was cited, where it was said Lord *Talbot* was of opinion that it should.

Mr. *Brown* the King's counsel said, that it was a very extraordinary determination; but Lord *Hardwicke* declared he would lay hold of it for the benefit of creditors, and ordered it to be referred to the Master to take the accounts of the creditors of *Edward Bathurst*, and also of his personal estate, and that the same be applied in payment of the debts in a course of administration; and his Lordship declared, that the defendants *Lutman* and *Wyat* and their wives, who claim the benefit of 4000*l.* for their wives by the settlement of the father made before marriage, which has been established by a verdict, are not intitled to the benefit of the sum of 5000*l.* under the trust of the term created by the deed of the 16th of *August*, 1738, but being made subject to the testator's appointment, ought now to be considered as part of his personal estate (1).

(1) *Reg. Lib. B.* 1744. fol. 378.

January 25, 1744. *Rehearings.* Case 94.

LORD CHANCELLOR,

WHERE the plaintiff charges a fact by his bill, which is denied by the defendant's answer, and the plaintiff examines only one witness to establish it, though the rule of the court is, where there is oath against oath (1), that the plaintiff shall not have a decree for relief upon this fact, yet this court, as well as courts of law, will so far lay stress upon the evidence of a single witness, as it serves to explain any collateral circumstance.

Where a plaintiff examines only one witness to establish a fact, yet the court will so far lay stress upon this evidence, as it serves to explain any collateral circumstances.

(1) *Walton* v. *Hobbs*, *ante* 2 vol. 19. and note.

Ashenhurst versus *James*, *February* 3, 1745. Case 95.

THE bill was brought by the plaintiff, a mortgagee, against the defendant to redeem, who had one puny judgment and two prior, which he had taken an assignment of on the same estate, and for an account of the rents and profits of the premisses in question, and for an assignment of the two judgments.

The defendant the assignee of two judgments, which were prior in point of time to the plaintiff's mortgage, is intitled to have interest on the whole money, the accumulated sum which he paid for those two judgments.

It appeared in the cause that the defendant had taken in the two prior judgments, by the desire of the plaintiff, who was not able to do it himself.

ASHENHURST v. JAMES.

LORD CHANCELLOR,

The first question is, Whether the defendant is intitled to have interest upon the whole money, the accumulated sum which he paid for the two judgments assigned to him prior to the plaintiff's mortgage.

The second question is, Whether the profits the defendant had received upon all the three judgments should be applied by him, or only such profits as he had received by virtue of the two prior judgments assigned to him by *Thomas Price*.

As to the first, I am of opinion the defendant is intitled to have interest upon the whole sum, principal and interest, though not upon the general rule, but on the particular circumstances of this case.

Where a mortgage is assigned with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest; otherwise if assigned without the mortgagor's consent.

The general rule is, Where a man makes a security on mortgage, and there is an arrear of interest thereon, if the incumbrancer assigns the same, with the concurrence of the mortgagor, the interest paid to the mortgagee by the assignee shall be taken as principal, and carry interest (1); but where it is assigned without the consent of the mortgagor, the assignee must take it only upon the same terms with the assignor (2).

This general rule admits of distinctions upon particular circumstances.

Here is an estate to be sold by virtue of a decree of this court, and the defendant is reported the best bidder. From that time he had as much reason to consider himself the owner of the equity of redemption, as if he had been a purchaser of it upon articles.

It is the same as if being confirmed the best bidder by authority of this court, where all the incumbrancers agree the defendant shall be purchaser, and he takes an assignment of all incumbrances by the consent of parties intitled to the estate, and therefore he is a creditor for the whole principal sum: their consent is the same thing as if they had been made parties to the assignment; this is strengthened too by what is sworn in his answer, that he desired the plaintiff to take them in, but he not being able to do it, requested the defendant to take them in.

If the purchase had gone off on the default of the defendant, I should then have thought he would not have been intitled.

I am of opinion for the plaintiff on the second question.

[272] Three judgments upon this estate, though defendant was a puny incumbrancer upon one of the judgments, being subsequent to the plaintiff's mortgage upon the same estate.

(1) *Smith* v. *Pemberton*, 1 *Cha. Ca.* 67. *Chamberlain* v. *Chamberlain*, *ibid.* 258. *Gladman* v. *Henchman*, 2 *Vern.* 135.

(2) *Porter* v. *Hubbart*, 3 *Cha. Rep.* 78. *Earl of Macclesfield* v. *Fitton*, 1 *Vern.* 168.

If

If a prior judgment creditor had continued in possession of this estate, he would have been intitled before the mortgagee, but he does not continue in possession, for he assigns his judgment to the defendant, and gives him possession, then the defendant may be said to receive the possession from the dates of the assignment of that judgment only.

ASHENHURST v. JAMES. A judgment creditor in possession of the estate, and prior to a mortgagee, assigns his judgment, the assignee's possession is from the date of the assignment only, but the rents he has received shall be deducted out of what shall be reported due to him for principal, interest and costs.

Indeed, if he had extended his own judgment, he would have had a right to have retained the profits received upon his own judgment; but as the case now stands, the defendant must make an allowance for the profits, therefore let the Master see what is due to the defendant for the sum of 260 *l.* 13 *s.* 9 *d.* paid by him to *Thomas Price* on his assigning the two judgments to him, and for the interest of that sum, and to compute interest for 150 *l.* part thereof being the original principal sum, after the rate of 5 *l. per cent. per ann.* and for the remaining 110 *l.* 13 *s.* 9 *d.* after the rate of 4 *l. per cent. per ann.* and take an account of the rents and profits of the premisses in question, which have been received by the defendant, and what shall appear to have been received, to be deducted out of what shall be reported due to him for such principal, interest and costs; and on the plaintiff's paying unto the defendant what shall be remaining due to him for such principal, interest and costs, he is to assign the two judgments, and deliver the possession of the said estate to the plaintiff.

Pollexfen versus *Moore*, *February* 5, 1745. Case 96.

MR. *Thomas Moore*, in his life-time, agreed to purchase of the plaintiff an estate called *Orchard* in *Somersetshire*, for 1200 *l.* but died before he had paid the whole purchase-money. *Moore*, by will, after giving a legacy of 800 *l.* to the defendant his sister, devises the estate purchased, and all his personal estate, to *John Kemp*, and makes him his executor (1).

M. agreed to purchase an estate of the plaintiff's for 1200 *l. but died before he had paid the whole purchase money*; *M.* by will, after giving 800 *l.* legacy to his sister, devises the estate purchased, and all his personal estate to *J. K.* and makes him executor: *J. K.* commits a *devastavit* of the personal, and dies, and the purchased estate descends on *B. K.* his son. The court, to give the legatee a chance of being paid her legacy out of the personal assets, directs the plaintiff to take his satisfaction upon the purchased estate for the remainder of the purchase money.

(1) *Moore* in his life-time paid 334 *l.* 9 *s.* 8 *d.* as part payment. The conveyances were prepared *and executed* by *Pollexfen* and his mother, but they retained them as a security for the residue of the purchase money. *Kemp* paid a further sum of 150 *l.* after *Moore*'s death. *Kemp* died intestate, and thereupon administration was granted of his personal estate to Lord *Orrery*, and administration *de bonis non* of *Moore*, was granted to *Mary Moore* his sister. It appears from *Mary Moore*'s answer, that *Kemp* had exhibited an inventory in the ecclesiastical court and had thereby charged himself with 1481 *l.* 10 *s.* 2 *d.* and had discharged himself of 863 *l.* 8 *s.* 4 *d.* as paid to *Pollexfen* in full for the residue of the purchase money.

Mr.

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Mr. *John Kemp* commits a *devastavit* of the personal estate and dies, and the purchased estate descends upon *Boyle Kemp* his son and heir at law.

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Mr. *Pollexfen* brings his bill against the representative of the real and personal estate of *Moore* and *Kemp*, to be paid the remainder of the purchase money.

Mrs. *Moore* the sister and legatee of *Thomas Moore* brings her cross bill, and prays that if the remainder of the purchase money should be paid to Mr. *Pollexfen* out of the personal estate of *Moore* and *Kemp*, that she may stand in his place, and be considered as having a lien upon the purchased estate for her legacy of eight hundred pounds (1).

LORD CHANCELLOR,

From the time of the agreement for a purchase of an estate, the vendee is a trustee as to the money for the vendor (2).

The vendor of this estate has to be sure a lien upon the estate he sold for the remainder of the purchase money, for from the time of the agreement, *Thomas Moore* was a trustee as to the money for the vendor.

But this rule is confined merely to the vendor and vendee, and will not extend to a third person.

But this equity will not extend to a third person, but is only confined to the vendor and vendee; and if the vendor should exhaust the personal assets of *Moore* and *Kemp*, the defendant will not be intitled to stand in his place, and to come upon the purchased estate in the possession of *Kemp*'s heir.

But then the heir of *Kemp* shall not avail himself of the injustice of his father, who has wasted the assets of *Moore*, which should have been applied in paying the defendant's legacy (3).

There-

(1) *Pollexfen* in his answer to the cross bill says, that he did not recollect, that any *formal* possession was ever delivered to *Moore*; and though it was agreed that *Moore* should have the possession from the time of the contract, yet upon *Moore*'s request he (*Pollexfen*) had *let* and *repaired* the premisses, and had received the profits upon *Moore*'s account.

(2) *Vide Chapman* v. *Tanner*, 1 *Vern.* 267. *Green* v. *Smith*, *ante* 1 vol 573. *Walker* v. *Preswick*, 2 *Ves* 622. *Fordiff* v. *Scrugham*, cited *Amb.* 726 *Fawell* v. *Heelis*, *ibid.* 724. *Blackburn* v. *Gregson*, 1 *Bro. Cha. Rep.* 420. *Cator* v. *Pembroke*, 2 *Bro Cha. Rep.* 282.

(3) His Lordship directed the Master to take an account of what the plaintiff had received on account of his purchase money, and of the rents and profits of the said estates received by him since *Lady day* 1737; and to compute interest on the residue of the purchase money due at *Lady day* 1737; and what should appear to have been received of the said purchase money, and of the rents and profits of the said estates to be applied in the first place in sinking the interest, and then the principal of the said purchase money. And his Lordship declared, "that the residue of the said purchase "money and the interest thereof, ought "in the *first place* to be paid out of the "*personal estate of the said Thomas Moore*." His Lordship then directed an account to be taken of the personal estate of *Thomas Moore* come to the hands of *Kemp*, *Mary Moore* and Lord *Orrery*, and that what of *Moore*'s personal estate should appear to have come to the hands of *Kemp* should be answered out of his personal estate in a course of administration; and in case it should appear, that *Moore* did not leave assets to pay what should be so due for the residue of the purchase money, *and all his other debts, legacies, and funeral expences*;

Therefore the estate which has descended from *John Kemp*, the executor of *Moore*, upon *Boyle Kemp*, comes to him liable to the same equity as it would have been against the father who has misapplied the personal estate; and, in order to relieve Mrs. *Moore*, I will direct *Pollexfen* to take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open, that Mrs. *Moore*, who can at most be considered only as a simple contract creditor, may have a chance of being paid out of the personal assets.

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pences; or if such personal estate of *Moore* was not *now* sufficient to pay the same by reason that the assets of *Kemp* were not sufficient to answer such part thereof as came to his hands, his Lordship declared, that such deficiency ought to be made good out of the *purchased* estate. *Reg. Lib. B.* 1745. fol 283.

Hicks versus *Hicks*, *November* 22, 1744. Case 97.

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A receiver during the infancy of the plaintiff, who had no guardian, was directed to place out the surplus of the rents, when the same should amount to a competent sum, on government or other securities, having never placed it out at interest, according to the decree, the court directed, that he should pay interest at 4 *l.* *per cent.* from the time of the decree, till the infant came of age (1).

IT was moved that Mr. *John Applegath*, the receiver of the rents and profits of the estates in question, may be charged with, and pay to the plaintiff interest for *the surplus* rents and profits, during the time the same remained in his hands, and which were not placed out by him at interest.

Mr. *Applegath* was appointed receiver in 1729, upon the 11th of *February* 1733, it was ordered by the decree in the causes, that the receiver, during the infancy of the plaintiff, who had no testamentary or other guardian, should place out the surplus of such rents and profits, when the same should amount to a competent sum, *with the approbation of the Master*, on government, or other good securities, in the names of trustees, to be approved of by the Master, and that the same should be paid to the plaintiff when of age.

LORD CHANCELLOR,

I am of opinion, that the receiver must pay interest at four *per cent.* for the surplus, rents and profits from the time of the decree in *February* 1733, till the infant came of age.

Because where there is no testamentary guardian, or any other appointed, it is the only care the court can take in such a case, that the most may be made of an infant's estate during his minority.

There have been several excuses made for the receiver.

First, That the express direction of the decree, is, that the receiver shall lay out the surplus rents, &c. *with the approbation of the Master in trustees' names to be approved of by him*; and there-

(1) So *Earl of Lonsdale* v. *Church*, 3 *Bro. Cha. Rep.* 41. See *Adams* v. *Gale*, *ante* 2 vol. 106.

Hicks v. Hicks.

therefore, as the Master gave no directions, he could not do it of himself.

It is no excuse for the receiver, that the Master did not give any directions about it, for it was his duty to remind the Master to lay out the surplus rents when it amounted to a competent sum.

But there is no force in this argument, because these words in the decree are merely of course, and the necessary business of Masters may be supposed to prevent them from attending to every minute particular in a decree, and it was the duty of the receiver to remind the Master, to lay out the surplus rents, as often as it amounted to a competent sum.

That buildings and farms are in a ruinous condition, and tenants often breaking, will not justify a receiver's keeping the balance in his hands, for it is not to be supposed he could exhaust the whole received from the rents of the estate.

*Another excuse was; that there were large buildings and farms upon the estate, which were in a ruinous condition, and very often tenants breaking, and that it was necessary for the receiver to keep the balance in his hands for rebuilding and repairs, or for the accident of empty farms, which must cost a good deal in *stocking*.

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If I should allow this to be an excuse, it would be attended with very ill consequences, for then every *receiver* of the rents and profits of real estate would pretend repairs were necessary; but it is impossible to suppose, though tenants are very fond of buildings, and repairs, that the receiver could in this case exhaust the money received.

The receiver's settling the accounts and delivering the vouchers to the plaintiff when he came of age, and his admitting the balance, and receiving it without objection, had no weight, as this transaction was two days only after he came of age.

A third excuse, made for the receiver, or rather a defence for him was, that on the 23d of *August* 1743, (the infant coming of age but two days before) the receiver settled accounts with the plaintiff, delivered up his vouchers, gave him copies of all the accounts passed before the Master, &c. that the plaintiff looked them over carefully, admitted the balance to be right, and received the same without any objection.

This does not weigh with me at all, for most young gentlemen are apt to pass accounts when they come of age, without looking into them, and are tempted to do it in order to get the balance from the receiver into their own hands.

Upon the whole it is very necessary for the sake of the practice of the court, with regard to infants, that the receiver in this case, from the time of the decree in 1733, should, for his negligence in not putting out the surplus rents, pay interest to the time the plaintiff came of age.

His Lordship directed the Master to enquire what sums of money the receiver ought, or might reasonably have laid out at interest, for the benefit of the estate, and that for such sums, the receiver should be charged at the rate of four *per cent*. (1).

(1) *Reg. Lib. A.* 1744. fol. 72.

Stribley versus *Hawkie*, *November* 28, 1744. Case 98.

MR. *Newnham* moved for a writ of assistance to the sheriff of *Cornwall*; there had been a writ of execution of the decree served on the defendant, and there had been an attachment.

After a writ of execution of a decree, and an attachment served on the defendant, the plaintiff may have an injunction to the defendant to deliver possession, and next a writ of assistance to the sheriff, commanding him to be aiding in putting the plaintiff in possession.

LORD CHANCELLOR, [276]

There must be an injunction to the defendant to deliver possession, the decree being for possession, and then a writ of assistance directed to the sheriff commanding him to be aiding and assisting to put the plaintiff in possession (1).

(1) *Vide Roberdeau* v *Rous*, Atk. 1 454. *Fonbl. Treatise of Equity* 31, vol. 543. *Pen* v. *Lord Baltimore*, 1 *Vez.*

Honeywood versus *Selwin*, *December* 1744. Case 99.

THIS cause came before the court upon exceptions to the Master's report.

S. gave a bond to pay 800*l.* a year to *H* during *S.*'s enjoying the office of   or whilst any body held it in trust for him, *H* put the bond in suit, *S.* brings a bill for an injunction, and a cross bill is brought by *H.* to discover whether *E* held the office in trust for *S.* *S.* insisted in his answer he was not obliged to discover what would subject him to the incapacities of the several acts to vacate a seat in parliament on a member's accepting a place. *He is not obliged to make the discovery.*

The exception was, for that the defendants have not set forth whether one *Eversall* did not hold the office of   in trust for the defendant *Selwin*.

Mr. *Selwin* had given bond to pay 800*l.* a year during his enjoying the office of   or whilst any body held it in trust for him.

The bond was put in suit by *Honeywood*.

The bill was brought by *Selwin* for an injunction, and the cross bill by *H.* to discover whether *Eversall* held the office in trust for *Selwin*.

Mr. *Selwin* insisted in his answer, that he was not obliged to discover that which would make him liable to the incapacities of the 12 & 13 *W.* 3. and other acts that vacate a seat in parliament upon a member's accepting a place.

LORD CHANCELLOR,

The defendant has done right in insisting upon this matter in his answer, he could not demur to it, because that would have been admitting the facts to be true.

The defendant did right in answering, for he could not have demurred to this matter, because that would have been admitting the facts to have been true.

I think

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I think he is not obliged to make the discovery.

It has been objected, that the plaintiff in the original bill coming for equity, ought to do equity, and discover whether the office is held in trust.

[277] But I am of opinion it has no weight.

S. shall not be compelled even to discover whether E. did not hold in trust for him during all the last parliament, as it would affect his seat now, for as E. is still in possession of the place, the House of Commons would believe E. a trustee for S. and declare his seat void.

It has been said that *Selwin* might discover whether *Eversall* did not hold in trust for him during all the last parliament, and that this could not affect his seat in parliament now.

His Lordship declared he ought not to discover even this (1), because if he did, upon an application to the House of Commons, they would certainly believe *Eversall*, who is still in possession of the place, is a trustee for *Selwin*, and declare his seat to be void.

(1) So *Harrison* v. *Southcote*, *ante* 1 vol 539.

Case 100. *Anon.* *July* 20, 1745.

A Bill brought by some of the members of a voluntary society against others of the same society, to settle and adjust some disputes between them as to the place where it is to be holden, and other matters.

A voluntary society entered into with an intention to provide by a weekly subscription for such of the members as should become necessitous, and their widows, is in the nature only of a private charity, and not necessary the Attorney General should be a party.

They entered first into this society in 1709, and have printed orders and rules for the government of the society; among the rest it is to be held weekly at one particular victualling house; upon the death of the master of the house, the stewards of the year went away to another house, and took the box, &c.

The intention was to provide by a weekly subscription of three pence a-piece for those who should become necessitous amongst them, the lame, blind, &c. and the widows, &c.

Mr. Attorney General objected for want of his being a party, as looking upon it to be in the nature of a charity.

LORD CHANCELLOR,

This is not such a society as makes it necessary for the Attorney General in behalf of the crown, to be a party, in order to see the right application of the money, but is in the nature only of a private charity, and therefore the objection must be overruled.

Lawley versus *Hooper*, *November* 19, 1745. Case 101.

THE plaintiff being a younger son of Sir *Thomas Lawley* deceased, and intitled to an annuity of two hundred pounds a year for life, out of the estate of Sir *Robert Lawley* his elder brother, (for further securing of which, Sir *Robert*, being only tenant for life, had likewise entered into a bond in the penalty of 2000*l.*) having by his indiscretion, and when about 21 years of age, involved himself in debt, and being a prisoner in the *Fleet*, and (as he stated by the bill) having no means of delivering himself from a gaol, and the difficulties he laboured under, than by disposing of the whole, or some part of the said annuity, he, by indenture dated the first of *June* 1727, sold to *Rowland Davenant* one hundred and fifty pounds a year, part of the said annuity of two hundred pounds, in consideration of one thousand and fifty pounds: In the deed there was *a proviso*, that if at any time the plaintiff should *desire to purchase back* the said three-fourth parts of the said yearly rent of two hundred pounds, and should give six months notice in writing to the said *Rowland Davenant*, his executors, &c. and should, at the expiration of such notice, pay to the said *Rowland Davenant*, his executors, &c. one thousand and fifty pounds, (then all arrears of the said annuity being paid) the said *Rowland Davenant*, his executors, &c. would re-assign to the plaintiff, or his assigns, free from incumbrances.

Ante 1 vol. 381. S. C. cited. Amb. 243. S. C. cited. The court of opinion the plaintiff was in this case intitled to a redemption; and that the annuity he granted ought to be reconveyed on his payment of 1050*l.* with legal interest, to be computed from the 1st of *June* 1737, the date of the deed; but directed, if any sums were advanced for the insurance of the plaintiff's life, they should be added to the 1050*l.* and carry 5 *per cent.* interest from the respective times of paying the same (1).

After this deed was ingrossed, and when all parties were met for the execution of it, *Rowland Davenant* insisted upon an indorsement being made on the back of the deed, and signed by the plaintiff; that in case the plaintiff should re-purchase *or redeem* the said three-fourth parts of the said annuity of two hundred pounds, the same should be upon payment of one thousand and fifty pounds, and seventy-five pounds, and all arrears, which indorsement the plaintiff charged he consented to, by reason of *the distressed circumstances* he was in at that time.

When the plaintiff executed the assignment he was in perfect health, and under the age of 22 years.

Mr. *Rowland Davenant* received the three-fourths of this annuity, being 150*l.* *per annum*, to the time of his death, which happened in *October* 1737, and the defendants, who are his executors, have received it ever since.

(1) The principal cases on this subject are as follow, *Barnardiston* v. *Lingood*, *ante* 2 vol. 133. *Stanhope* v. *Cope*, *ante* 2 vol. 231. *Willis* v. *Jernegan*, *ibid.* 251. *Longuet* v. *Scawen*, 1 *Ves.* 402. *Caverley* v. *Dudley*, *post.* 541. *Flover* v. *Sherard*, *Amb.* 18. *Searle* v. *Carpenter*, *Amb.* 242. *Gwynne* v. *Heaton*, 1 *Bro. Cha. Rep.* 1. *Inham* v. *Child*, *ibid.* 92. *Vaughan* v. *Thomas*, *ibid.* 556. *Henley* v. *Acton*, 2 *Bro. Cha. Rep.* 17. *Heathcote* v. *Paignon*, *ibid.* 167. *Griffith* v. *Spratley*, *ibid.* 179. in note. *Lord Portmore* v. *Morris*, *ibid.* 219. *Hare* v. *Sherwood*, 3 *Bro. Cha. Rep.* 168. With respect to the nature of an *annuity* as distinguished from a *security* for money, see the *Essay on Uses and Trusts*, 366, 367.

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The plaintiff has now brought this bill for an account of what was due to the defendants as representatives of Mr. *Davenant*, for principal and interest of the thousand and fifty pounds, and of what defendant had paid for the insurance of the plaintiff's life, which, by his bill, the plaintiff submitted to allow; and that upon payment of what should be due, the defendants might re-assign the said annuity to the plaintiff, or as he should direct, free from incumbrances, with all the securities given by Sir *Robert Lawley*, for the due payment thereof.

The defendants, who were the executors of Mr. *Rowland Davenant*, insisted, this was a fair transaction, that it was a purchase, and not a mortgage, and the plaintiff was not intitled to re-purchase, but on the terms of the deed and indorsement: They insisted Mr. *Rowland Davenant* knew nothing of the plaintiff's being in gaol, till after the purchase was agreed for, and said, the reason of his insisting on the indorsement was, because no time was limited in the deed for the plaintiff to repurchase the same, which was contrary to the usual forms of such provisoes, and that it was not worth his while to lay out one thousand guineas upon the terms of being paid off soon; and they also insisted, that one thousand and fifty pounds was the full market price for the annuity, especially as it was only secured by a personal security, in case of the death of Sir *Robert Lawley*.

Lord Chancellor,

The court hath very prudently avoided laying down any general rule in cases of this kind, beyond which they will not go, for fear the schemists for exorbitant interest should find out other means to avoid the equity of this court.

There has been a long struggle between the equity of this court, and persons who have made it their endeavour to find out schemes to get exorbitant interest, and to evade the statutes of usury: The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity of the court should be found out: Therefore they always determine upon the particular circumstances of each case; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been given.

In this case there are two questions to be considered, first, whether this assignment of the first of *June*, 1737, is to be considered as an absolute sale, or as a security, or loan.

Secondly, whether there be any ground to relieve against it, admitting it to be a sale.

A strong foundation to consider this as a loan, for most of these bargains are merely loans, but turned into this shape to avoid the statute of usury.

As to the first, I think (though there is no occasion to determine it) there is a strong foundation to consider it as a loan of money, and I really believe in my conscience, that ninety-nine in a hundred of these bargains are nothing but loans turned into this shape to avoid the statutes of usury.

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There is little difference between the meaning of the word redemption and repurchase, and in the indorsement are used promiscuously, which shews the parties themselves considered it as a power to redeem.

Here was an extravagant young man, who had been twice in prison, was committed to the *Fleet* the 2d of *June* 1736, and discharged the 1st of *November* 1736; was again a prisoner the

7th of *March* 1736-7, and this produced the bargain: the deed bears date the 1st of *June* 1737, and he is discharged out of the *Fleet* the third: The proviso in the deed uses the word *repurchase* (1), but there is very little difference in reality between the meaning of the word redemption and repurchase; one of the witnesses (*Sparrow*, the defendant's solicitor) uses the word redemption; and I take the word purchase, used in all the other depositions, to be only a cant word, meaning a sale or mortgage; and the indorsement on the back of the deed uses the words repurchase and redemption promiscuously, which plainly shews that it was considered by all parties as a power to redeem.

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But it is objected, that this is not to be considered as a mortgage, because there is no covenant in the deed to repay the money; but that objection is not well founded, for it is not necessary; all *Welsh* mortgages are without this covenant, and so are most copyhold mortgages (2).

There being no covenant to repay the money, does not make it less a mortgage; for the *Welsh*, and most copyhold mortgages, have not this covenant.

Another objection which has been made, was, that a man must be out of his senses to lend his money upon annuities for a life, which may drop the next day, and speaking abstractedly, and merely on the nature of annuities for life, there seems to be weight in this objection? But every body knows that this casualty of losing the principal, is secured, by insuring the life upon which the annuity depends.

But it is said that every life cannot be insured; indeed, the insurance offices will require different terms, according to the life, but still they may be insured, and it is admitted that this life was a good one.

But there are two circumstances more, which shews that this was intended and understood as a security: When the parties met to have the deed executed, it was objected by the lender, to the terms of the condition to purchase back, that it was made to be at any time, and he said it was usual to restrain it to a certain period of time.

What does this import? It is plainly the language of a lender of a sum of money: Another circumstance is, that he insisted upon the payment of seventy-five pounds more, and would have six months notice; the consequence of this was, that he would have this time to find out another hand to take his money, and would have interest for his money during those six months, but upon payment of seventy-five pounds more he might redeem, which was the same, as saying, you shall give me six months notice, or pay me six months of the annuity. [281]

Therefore, upon all the circumstances, I think this was, and is to be taken as a loan of money, turned into this shape only to avoid the statute of usury; but I do not think I am under any absolute necessity to determine this point, for I am of opinion, that this is such an agreement as this court ought not to suffer to stand, taking it as an absolute sale.

Lord *Hardwicke's* of opinion that the difference in the value of annuities for one's own life, and that of another, has been entirely caused by the dealers in these annuities.

(1) *Vide Amb.* 243. (2) *Vide Yates* v. *Hambley*, *ante* 2 vol. 363.

An

Lawley v. Hooper.

The variation of the term was taking advantage of the plaintiff's distress, and infects the whole case, the the agreement ought to be totally set aside.

An objection was made, that greater inconvenience would follow from such a determination as this, because it would oblige all annuitants of this kind to sell absolutely; but I think no inconvenience of this sort will ensue, it will rather hinder such annuitants from selling at all; and I believe in my conscience, that the difference which is now made between the value of annuities for one's own life, and that of another, has been entirely caused by the dealers in these annuities.

But consider the circumstances of this case, supposing it a sale, there was no pretence for the addition of 75*l.* this was not an interest which was growing better, on the contrary, every year the plaintiff lived it was growing worse; and yet he is made to agree to pay 75*l.* more for the repurchase, as if the annuity was worth more after three years of his life was spent, than it was at the time of the purchase: The plaintiff was then a prisoner in the *Fleet*, and in distress, and was forced to submit to these terms, he could not then oppose them, and therefore I consider the variation of the terms of the agreement as taking advantage of his distress, a variation for which there was no pretence, and a most unreasonable thing: If then, this was unreasonable, it infects the whole case, and the relief must be by setting aside the whole agreement.

Therefore I declare, that, under the circumstances of this case, the plaintiff is entitled to a redemption of the sum of one hundred and fifty pounds a year, part of the annuity of two hundred pounds, assigned to the defendant's testator the first of *June* 1737, and that it ought to be reconveyed to him upon the payment of the sum of 1050*l.* with the legal interest for the same; and let it be referred to the Master to compute interest upon the said sum, at the rate of 5 *per cent.* from the first of *June*, 1737, and let him enquire whether any thing hath been paid by the testator in his life-time, or by the defendants since his decease, for the insurance of the plaintiff's life; and let what shall appear to have been, or shall be reasonably so paid, be added to the principal sum of one thousand and fifty pounds, and carry interest at the same rate from the respective times of paying and advancing the same; let him also take an account of all sums of money received by the
[282] defendants' testator in his life-time, and the defendants since his decease, upon account of the said annual sums of one hundred and fifty pounds; and let what shall be so found to have been received be applied, in the first place, in payment of the interest of the said sum of one thousand and fifty pounds, and afterwards in sinking the principal; and if it shall appear that the defendants are over paid, then they are to repay and refund, and the defendants are to reconvey the said annual sum, or annuity of one hundered and fifty pounds, free from all incumbrances, by the defendants or their testator, in six months after the Master shall have made his report, and at such time as the Master shall appoint, and deliver up all deeds, &c. and in default of payment by the plaintiff, his bill to be dismissed with costs (1).

(1) *Reg. Lib. B.* 1745. fol. 104.

N. B. It was urged for the defendants, that they ought to be allowed for the inſurance of the plaintiff's life, though it was not actually inſured; but Lord Chancellor would not allow it; and *note* alſo, he decreed this redemption as above, without coſts.

LAWLEY v. HOOPER. The court will not allow any thing on account of inſurance, unleſs the life be actually inſured.

Sheffield verſus *Lord Orrery and others*, *December* 4, 1745. Caſe 102.

LORD CHANCELLOR,

IN this caſe the end of the bill is, to have the benefit of a truſt created by the will of *John* Duke of *Buckinghamſhire*, relating to *Buckingham-houſe*, the pictures, ſtatues, and other parts of his perſonal eſtate; and alſo for the rents and profits of certain eſtates called *Pimlico*, received ſince the death of Duke *Edmund*.

J. late D. of B. by his will ſays, that if no legitimate ſon nor daughter of mine ſhall live to leave at any time the bleſſing of any child behind them, in ſuch caſe of their dying thus, without leaving any iſſue of them, I will and direct that *Charles Herbert*, and his iſſue, ſhall have all my eſtate. *This limitation to* Charles Herbert, now Sheffield, *is not too remote, but warranted by rules of law* (1).

The whole depends upon the conſtruction of the will of Duke *John*, and two general queſtions ariſe thereon.

Firſt, Whether the whole of *Buckingham-houſe*, or any part thereof, is freehold? For, if ſo, it is admitted it belongs to the plaintiff.

The ſecond general queſtion is, ſuppoſing the whole, or any part thereof, to be leaſehold, whether by virtue of the limitation in the will of Duke *John*, it did, on the death of Duke *Edmund*, go over to Mr. *Sheffield*.

I put the counſel upon arguing this point firſt, to prevent expence and vexation; for, if this houſe is well limited to Mr. *Sheffield*, whether it is freehold or leaſehold, then all queſtions, whether in reſpect to its being freehold or leaſehold are unneceſſary. [283]

The clauſes in the will on which this queſtion immediately depends, are the clauſes marked N°. 2, 4, and 9. as to the clauſes N°. 8 and 14, theſe are only made uſe of for argument and explanation, or taken up by way of objection: The clauſes are as follows:

Second clauſe. "In the firſt place my will and meaning is, "that my dear wife ſhall have, during her life, my new built "houſe in *St. James's Park*, with the two wings adjoining, "and all the ſtables, garden, courts and greenhouſes thereunto "belonging, with all my oil and water-coloured pictures and "ſtatues therein, except what I ſhall particularly mention and "give away otherwiſe, either now or hereafter; but I give all "theſe things and this houſe alſo before mentioned for her life, "*upon this expreſs condition only, that if my ſaid wife ſhall marry* "*again, then my will and meaning is, that my ſaid houſe with the*

(1) *Vide Hodgſon* v. *Buſſey, ante* 2 vol. 89. *note* 1.

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"*said two wings before mentioned, pictures and statues, shall go* "*forwith to my eldest son and his issue*, and if all his issue male shall "die, then to my eldest daughter and her issue; and if I leave "no lawful issue, then to a certain youth called *Charles Herbert*, "now under the tuition of Monsieur *Brezy* at *Utrecht*, and if "he should die without issue, then to my two natural daughters "*Sophia* and *Charlotte*, now at school in *Chelsea*.

The *fourth* clause. "In the next place my will is, that my "eldest son and his issue, and if he leave none, my eldest daugh- "ter and her issue shall after my death have all my whole estate "real and personal, except still what I have given thus to my "dear wife, and shall give by other dispositions to her, or to "any other uses, or to my natural children.

The *ninth* clause. "If I should be so unhappy as that no le- "gitimate son nor daughter of mine shall live to leave at any "time the blessing of any child behind them, in such case of "their dying thus without leaving any issue behind them, I will "and direct that the before-mentioned *Charles Herbert* and his "issue shall have all my estate both real and personal, just in "the same manner and with the same restrictions and exceptions "as to my wife."

The principal questions which arise under this general head are these three.

First, Whether by the second clause the house, pictures and statues, are absolutely devised in all events to Duke *Edmund*, so as to receive no restriction or alteration from the several other clauses in the will.

[284] *Secondly*, Whether the house, pictures and statues, mentioned in the second clause, are comprised in the 4th and 9th clauses, or not.

Thirdly, Supposing they are comprised in the 4th and 9th clauses, whether the limitation therein contained to Mr. *Sheffield* is warranted by the rules of law, or is too remote?

As to the first, It was insisted for the defendants, that this is a devise to the Duchess during her widowhood, and the limitation to Duke *Edmund* was to take place either on the marriage, or death of the Dutchess; and if it be allowed this is an estate given to the Dutchess during her widowhood, it is a vested remainder in Duke *Edmund*, and the limitation to *Charles Herbert* is too remote: On the other side it was insisted, that this clause must be construed according to the words, and that no estate is vested in Duke *Edmund* but on the contingency of the Dutchess's marriage.

A. devises that his wife shall have for her life his new built house in *St. James's Park*, with, &c. thereunto belonging, but on this express condition, that if she shall marry again, then that the house, &c. shall go forthwith to *his eldest son* and his issue, and if all his issue male shall die, then to his eldest daughter and her issue; and then says, if I leave no lawful issue, to *Charles Herbert*, and if he die without issue, then to, &c. *This is not a vested remainder in the the eldest son, but a contingent one, and to take effect on the wife of the testator marrying again.*

I am of opinion that upon the whole will the limitation to Duke *Edmund* was but a contingent remainder, and to take effect only on the Dutchess's marrying again; the words are upon

on this express condition only, that if my said wife should at any time marry again, then my will and meaning is, that my said house, &c. shall go forthwith to my eldest son and his issue. SHEFFIELD v. Ld. ORMSBY.

I admit the authorities cited for the defendants to be as they are stated, but I do not see that any conclusive argument can be drawn from thence to influence the present question.

The first case was *Jones* versus *Westcombe*, *Eq. Cas. Abr.* 245. that case was thus; *A.* possessed of a long term for years devised it to his wife for life, and after her death to the child that she was ensient with, and if such child died before it was 21, then he devised one third of the term to the wife, her executors, &c. the wife was not ensient, and the question in the cause, so far as it relates to the present point, was, as the contingency upon which the devise to her was to take place never happened, whether the devise to the wife of the third part was good. Lord *Harcourt* delivered his opinion, that the devise was good; the ground of his opinion was, that the words should be construed, as if they had been, if such child dail before it was 21.

Fonereau versus *Fonereau* (1), before Lord *Hardwicke*, *Easter* term 1745. This case was determined nearly upon the same reason, but the penning of that will was so very particular, that no precedent can be drawn from thence.

Brown versus *Cutler*, *Raymond* 427. and in *Shower*, and in 3 *Lev.* 125. under the name of *Luxford* versus *Cheek*, the case was this: *John Church* being seised in fee, having four sons, *Humphry*, *Robert*, *Anthony*, and *John*, made his will, and thereby devised his estate to his wife for life, if she do not marry again, but if she do, then that his son *Humphry* should presently after his mother's *marriage* enter and enjoy the premisses to him and the heirs male of his body, remainder to testator's other sons in like manner with remainders over; the testator died, the wife enters, and dies without being married, the plaintiff claimed as the right heir of the testator, being his grandaughter; the defendant claimed as heir male of the body of the testator: The question was, whether, as the wife never married, a good estate-tail was created by the will: the court held it was a good intail, for that by the whole scope of the will it appeared that the testator intended an intail, and rather than the intent of the testator should be defeated, the court construed the words in such a manner as to make it an intail. Thus it is reported in *Levinz*; and *Raymond* seems to have reported his own argument, rather than that of the court: This is the strongest case cited, but differs materially from the present. The penning is different; there after the devise are added these words, *if she do not marry again*, which restrain the original limitation, and are the same as if they had been to the wife for life, if she so long continue a widow. There are no such words in the case at bar in the original limitation; but I do not lay much weight on this. The cases appear to me [285]

(1) S. C. *post* 315.

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to differ in substance; there were no words in that will which could substantiate the testator's intent without construing it an estate-tail; otherwise the testator's intent would have been manifestly defeated. The court therefore was constrained by necessity to make such a construction as would satisfy the testator's intent; for this is the very reason given by Mr. Justice [illegible]. In the present case there is no such necessity for such a construction, for the subsequent words are sufficient to express his meaning, that after Duke *Edward*'s death without leaving children, it should go to Mr. *Sheffield*, and the intent of the Duke is more effectually answered by this construction than any other.

A general rule was laid down by the counsel for the defendants, that where a testator gives a particular estate to a person, and after gives the remainder over upon a contingency, which contingency is to determine that estate sooner than the estate would otherwise be determined, there if the contingency does not happen, yet the limitation over shall be good after the determination of the first estate.

[illegible]

I know of no such rule, for the cases which can be put, depend upon particular words and the intent of the party. But there is an express authority that there is no such rule, * *Amhurst* versus *L*[illegible], which was heard on the [illegible] of *March*, 1729, in the house of Lords (1). The case was thus. The testator devised an estate to his [illegible], remainder to [illegible] for life, [illegible] and gave it over [illegible] with divers remainders over, [illegible] took the [illegible] 1727, [illegible] the opinion of the judges (2), [illegible] remainder-man was [illegible] and not by [illegible] the judges of the [illegible] that the remainder-man [illegible] was confirmed by the [illegible] authority there is no such general rule [illegible] laid down by the counsel.

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The next question is, [illegible] devised by the [illegible] comprised in the [illegible] clauses.

I am of opinion that the [illegible] after the Duchess's life does fall within the [illegible].

(1) 3 *Bro. Par. C.* 465. S. C. (2) [illegible] 21. S. C.

But

But it has been first objected that *the fourth clause* is residuary, and expresly excepts and takes out the particular things devised by the *second* clause, and not the estate, and interest only in those things.

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B. by the 4th clause of his will says, that my eldest son and his issue, &c. shall after my death have all my whole estate real and personal, except still what I have given to my wife, and shall give by other disposition to her, &c. *The exception takes out of this residuary devise only the interest given to the wife, and not the things themselves.*

I think this is contrary to the words, for the will in this clause mentions *all his whole real and personal estate*, and I think the exception takes out of it only the interest given to the Duchess, and not the things themselves; and this is supported by *Walker's* case, and many others.

Next it was objected, there is a different disposition in *the fourth* clause from that in the second, the estates in the second, being limited to Duke *Edmund* and his issue male, and by the fourth to Duke *Edmund* and his issue generally: I admit there is a difference, but that seems a mistake in the second clause, and is set right by the fourth clause, by making the estate and house go together.

If these particulars are comprised in the fourth clause, they are still more clearly comprised in the ninth; the words in this clause are not only very general, *all my estates real and personal*, but in the ninth clause the subsequent words are more particularly adapted to shew, that the estate and interest only were saved to the wife, and not the subjects or things themselves; the words are with the same exceptions as to my wife, and the word *restrictions* points out expresly a limited interest; but there are some objections which have been taken. [287]

First, It has been objected, that the eighth clause is co-extensive with the ninth, and consequently if the house is comprised in the ninth, it must be in the eighth, for it is that all things comprised in the eighth clause are directed to be sold, and consequently the house, pictures and statues must be sold contrary to the Duke's manifest intent.

This is clearly otherwise, for by the *eighth* clause the trustees are not directed to sell, but to dispose of all his real and personal estate, and therefore the word *dispose* does not import to sell, but to manage to the best advantage for the family; and the subsequent words which direct to buy land are confined to money, and cannot extend to the house, statues or pictures: And the general direction to sell is constrained in the *fourteenth* clause.

The directing the trustees to dispose of all his real and personal estates, does not import to sell, but to manage it to the best advantage for the family.

The third question is, That supposing the particulars devised by the second clause are comprised in the fourth and ninth clauses, whether the limitations over are warranted by the rules of law concerning the limitation of terms, or whether they are not too remote.

This seems the plainest point of all, and falls within the distinctions of the cases on this head, the words are these, *If I should be so unhappy as that no legitimate son, &c. (vide the words).*

It

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If the limitation of a personal chattel be confined within a life or lives in being, or within ten months, or the birth of a child, or in case of his death before 21, or if limited on a contingency to a person who never takes it is good(1).

It is clear and certain, that no limitation over of a personal thing can be admitted after a dying without issue generally; but if this is confined within a life or lives in being, or within ten months, or the birth of a child, or in case of the death of such child before the age of twenty-one, or if limited on a contingency to a person who never takes, the limitation is good. This has been determined in many cases, particularly *Higgins* versus *Dowler*, 2 *Vern*. 600. *Stanley* versus *Lee*, 2 *P. Wms*. 618. *Sabberton* and *Sabberton*, *Cases in Lord Talbot's time*, 55, &c. In this present case it is very clear that the words are restrained to legitimate children of Duke *John*'s dying without issue *living* at their deaths: The words are, *If no legitimate son, &c. shall live to leave any child behind them, in such case of their dying thus without leaving any issue behind them, I will and direct, &c.* in short few cases are so restrictive; the first words spoke of his immediate issue, the subsequent are extended to more remote issue, but still are restrained to the case of dying *thus*, &c. so that no words can be more restrictive. In the case of *Pinbury* versus *Elkin*, 2 *Vern*. 758. a liberal construction was made to comply with the testator's intention.

[288] In *Sabberton* versus *Sabberton* it was determined on these words, *in case they should not leave any lawful issue*.

Forth versus *Chapman*, 1 *P. Wms*. 663. seems an authority in two respects; the case was this; *Walter Gore* by will devises all the residue of his estate real and personal to *John Chapman*, in trust for the use of his nephews *William Gore* and *Walter Gore* during the term of a lease, and as to the remainder of the estate, as well as his freehold house, with all the rest of his goods and chattels whatsoever, he gave to his nephew *William Gore*, and if either of his nephews *William Gore* or *Walter Gore* should die, and *leave* no issue of their respective bodies, then he gave the leasehold premisses to the daughter of his brother *William Gore*, and the children of his sister *Sidney Price*: The question was, whether the limitation over was good, or too remote. Sir *Joseph Jekyll* was of opinion it was too remote; but Lord *Macclesfield* decreed this limitation good, upon the words *leave issue*.

In looking into the case of *Forth* versus *Chapman*, 2 *P. Wms*. 663. the reporter seems mistaken *in his second note*, for though he says the limitation over was restrained to the leasehold, it appears the freehold too was devised, and probably the limitation of the real was overlooked by the register.

Mr. *Williams* seems mistaken in the second note on this case, where he says, *by the will the limitation over was expressly restrained to the leasehold*; for upon looking into the case, it appears that both *freehold* and leasehold were devised by the same words; but probably the limitation of *the real* was overlooked, and so omitted by the register.

Some distinctions or objections have been made by the defendant's counsel.

First, That in the present case there is a limitation in tail, precedent to the limitation by *the ninth* clause.

(1) See Mr. *Cox*'s note to *Higgins* v. *Dowler*, 1. P. W. 98.

If

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A general limitation may be turned into a particular contingent limitation by subsequent words.

If this is admitted, yet a general limitation may be restrained or turned into a particular contingent limitation by subsequent words, supposing there are subsequent words sufficient for that purpose, as was determined in the case of *Lamb* versus *Archer*, 2 *Salk.* 225.

Another objection was, that in the present case a real estate is joined with a personal, and therefore the same construction ought to be made of the words.

Though real and personal estates are joined in a devise yet the same words may be taken in a different sense, with regard to the different estates, to support the intention of the party.

I do not see any reason why different constructions may not be put on the same words; to say they cannot, is contrary to the case of *Forth* versus *Chapman*, for there the freehold and leasehold were given by the same words (1); and yet Lord *Macclesfield* made a different construction, that the intent of the *testator might prevail; and I think it very reasonable to take words in a different sense with regard to the different estates to support the intention of the party, *ut res magis valeat quam pereat.*

A third objection was, that the testator did not intend to create a particular contingent limitation of the leasehold estate to Mr. *Sheffield*, distinct from the freehold.

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This is begging the question; possibly the testator intended a strict settlement, and though it cannot have its full effect with regard to one estate, if there are words sufficient for that purpose, it may have effect with regard to another; the testator manifestly intended a full disposition of his estate, and it ought to be carried into execution as far as may be, according to his intention many cases have been cited, but I think there are none that come up to the present. *Lord George Beauclerk* and *Miss Dormer*, before me *June* 17, 1742. (2). was after a general dying without issue, and therefore the limitation over could not be good. *Green* versus *Rod, Trin. T.* 2 & 3 *Geo.* 2. *Fitzgibbons* 68. was much the same; that was, if a sister should die without issue generally; the estate was limited over; the counsel would indeed have brought this case to have been like *Pinbury* v. *Elkin* (3), by observing on the words *after her decease*; but Lord *King* observed, that to the words after her death were added the words *in manner aforesaid*, which manifestly made it a general dying without issue, and upon that ground determined the limitation to be void.

Therefore, upon the whole, I am of opinion that the limitation over in the *ninth* clause is warranted by the rules of law.

Another question has been started, whether *the house, pictures and statues* do not fall within the fourteenth clause, and therefore must be sold, which it is insisted defeats the intent of the testator as much as the other construction would have done.

(1) *Vide* 2 *Vez* 180.
(2) *Ante* 2 vol. 303.
(3) 1 *P. W.* 563, S C.

I am

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I am of opinion *that the house, pictures and statues* are not directed to be sold, the words in this clause are, *all my money, and all other my personal estate not otherwise given or disposed of*; I understand these words to mean that such as he had given away, were not to be sold; particular estates and interests in any part of his personal estate could not be sold, but the remaining interest might be sold, unless so settled as not to be sold.

I conceive that *the house, pictures and statues* were so fettered, as that the remainder, after the interest of his wife, could not be intended to be sold; the Duke directs the things to be sold as soon as conveniently might be; but they are so clogged by the [290] limitations that no sale could take place in any reasonable time; therefore I rely on the second clause, as a sufficient declaration of the testator's intention, that this part of the personal estate should not be sold.

All I have said is strengthened by some general considerations: this is an intire mansion-house, designed for the seat of the family; could the testator design it should be mangled, and cut to pieces, that it should be severed from the bulk of the estate? Upon failure of his legitimate issue, he has directed his natural children to take his name and arms, and therefore nothing can be more opposite to the Duke's intentions, than the construction contended for by the defendants.

The plate is given to the Dutchess during her widowhood, and is not influenced by any of the clauses, but falls into the bulk of the estate, therefore the residuary interest might be sold during the life of the Dutchess.

"Lord *Hardwicke* decreed that the defendants, the executors of the late Dutchess of *Buckinghamshire*, do deliver the possession of *Buckingham House*, with the two wings adjoining, and all the out-houses, gardens, *&c.* thereunto belonging, to Mr. *Sheffield*, and also all the statues, and all the oil and water-coloured pictures upon oath, which belonged to *John* the late Duke of *Buckinghamshire*, and were in the house at the time of his death, and to deliver also, upon oath, all the deeds and writings to Mr. *Sheffield*; and as to the plate which belonged to the testator at the time of his death, that such part thereof as is remaining in specie, and in the custody of the defendants, be delivered upon oath to such person as the Master shall appoint; and that the same be sold, and the money arising by such sale be applied in like manner as the testator's personal estate, not specifically bequeathed, is by the former decree directed to be applied; and as to such of the plate as is not now remaining in specie, the Master was to inquire what part thereof hath been converted by the late Dutchess of *Buckinghamshire*, or the defendants, and take an account of the value of such part of the plate as hath been so converted, and what shall be coming on the account for the plate so converted, be answered by the executors of the Dutchess out of her personal estate in a course of administration, and that the amount of the plate so converted be applied in like manner as is di-

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"rested by the former decree concerning the testator's personal estate not specifically bequeathed; and as to all the lands in *Pimlico*, admitted to have been part of the freehold estate of *John* Duke of *Buckinghamshire*, he ordered that the tenants pay the arrears and growing rents to the plaintiff, and that an account be taken of the rents accrued since the death of *Edmund* late Duke of *Buckinghamshire*, which were received by the Dutchess in her life-time, and what shall be coming on that account be paid to the plaintiff by her executors out of her personal estate in a course of administration; his Lordship would not allow any costs to the [291] Dutchess's executors, but directed if they gave Mr. *Sheffield* any unnecessary trouble in respect to his obtaining the possession of the house, statues and pictures, that Mr. *Sheffield* should be at liberty to apply to the court for the costs of this suit to this time against these defendants."

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Warrick versus *Warrick and Kniveton*, *February* 11, 1745. Case 103.

A Bill was brought by the plaintiff against the defendants, for an account of the rents and profits of his father's estate, and for possession, and that he may have the full benefit of the marriage-articles made on the marriage of his father and mother.

Lord *Hardwicke* inclined to think, that the limitation in a settlement to *W. R* for life, and to the use of the heir male of his body, had created an estate tail in him, and that the plaintiff has not the legal title to this estate, and that he had, not intitled to come into equity for deeds and writings, till he had established it first at law, and therefore dismissed the bill so far as it prays to set aside the mortgage, but left him at liberty to redeem *K* the assignee of the mortgage.

Thomas Warrick the plaintiff's father, by articles before marriage, dated the 28th of *December*, 1714, had the estate in question limited to him for life, and after his death to *Honor* his intended wife for life, and after her death *to the use of the heir male of Thomas Warrick to be begotten on the body of Honor*.

By lease and release dated the 28th and 29th of *December*, 1714, *and declared to be in pursuance of the said articles*, the said premisses were conveyed to *Thomas for life*, and to *Honor for life*, and after her death *to the use of the heir male of Thomas, begotten on the body of Honor*.

The marriage afterwards took effect, and *Thomas Warrick* died in 1739, leaving the plaintiff his eldest son, who insists, that *Thomas Warrick* was intended to be tenant for life only, with remainder to his first and every other son successively as tenants in tail, and that he is a purchaser under the marriage-articles, and that they ought to be considered in the same light as if they had been strictly carried into execution.

The defendant *Kniveton* insisted, that *Thomas Warrick* did, in his life-time, borrow of *Deborah Westlake* 300*l.* and on the 21st of *August* 1736, conveyed the estate in question to her and her heirs,

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heirs, subject to a redemption on payment of principal and interest, and that the representatives of *Deborah*, in consideration of 314 *l.* paid to them by this defendant, and *Thomas Warrick*, in consideration of 36 *l.* paid to him likewise, did convey his interest and the equity of redemption to this defendant on the 25th of *October*, 1737, and that neither he nor any concerned for him had any notice of the marriage-articles or settlement till after the death of *Thomas Warrick*; and insists on his being a purchaser for a valuable consideration.

[292] The plaintiff's evidence of notice was, that *Hawkins* was, in his life-time, concerned as attorney for *Deborah Westlake*, in ingrossing the mortgage-deeds from *Thomas Warrick* to her, and that in the year 1735, he said to one of the witnesses that if *Thomas Warrick* could not cut off the entail of his estate to raise money, he must be thrown into gaol, and that he had seen the settlement, and believed it might be done; and that he drew with his own hand a case for the opinion of counsel, and that he was likewise employed as attorney for *Deborah Westlake*, in ingrossing the mortgage dead of 1736, and for *Kniveton*, in drawing the assignment of the mortgage from *Deborah Westlake's* representatives to *Kniveton*.

The value of the estate mortgaged was 25 *l.* *per annum*.

On the point of constructive notice were cited the cases of *Tovey* versus *Tovey*, *Bifcoe* versus *Earl of Banbury*, 1 *Ch. Caf.* 287, 291. and *Whitchcock* versus *Sedgwick*, 2 *Vern.* 156.

The articles and settlement were both before marriage.

Lord Chancellor,

The first question is, Whether the plaintiff has the legal title to this estate?

The second question is, Whether there was sufficient proof of notice in this case to the defendant *Kniveton*?

As to the first, it is not absolutely necessary to determine it, but in the present case I rather think he has not.

Because by the release the limitation is to the plaintiff's father for life, and to the use of *the heir male* of his body in the singular number; such a settlement as this would rather create an estate-tail in the father, on the words in *Co. Litt.* 22. *a.* where lands were given to a man and to his wife and to *one heir* of their bodies, and to *one heir* of the body of that heir; it was adjudged to be an estate tail in the father. I remember in the argument in the case of *Trellop* versus *Trellop* (1), Lord Chief Justice *Eyre* cited it, and said it was a limitation in tail by gift, that my Lord *Coke* spoke of; but I am of opinion in the present case that if the plaintiff had a legal estate, he is not intitled to come here for deeds and writings.

He ought first to establish his title at law, unless he had shewn terms were standing out, so that he could not recover at law: there is nothing pretended of this kind, for he has both articles and settlement in his custody; nor does he suggest old terms are standing out, therefore he comes too early for deeds and writings, if this was the whole of the case.

(1) *Rob. Gavelkind*, 96. S. C. *ante* 1 vol 412.

The more material point, supposing the legal estate was in the plaintiff, is, whether there be sufficient evidence of notice to the defendant *Kniveton* of the plaintiff's right under the articles.

I do not think there is sufficient ground to give relief against a purchaser on the circumstances of this case.

First, Whether from the nature of the articles themselves they will warrant me to decree the legal estate from the purchaser.

It is certainly true from the general principles of this court, that if articles on marriage are to settle an estate to *A.* for life, to his wife for life, remainder to the heir male of the body of *A.* it is taken here to be in strict settlement, and an estate for life only in father and mother; and if the settlement be made after marriage, it shall be rectified by the articles before (1).

Where by articles an estate is to be limited to *A* for life, to his wife for life, remainder to the heirs of the body of *A.* this is considered here as an estate for life only in the father, and the settlement made after shall be rectified by the articles before marriage.

The case of *West* versus *Erissey*, 2 *P. Wms.* 349. was both upon articles and a settlement before marriage; this was the first case, where the court altered a settlement, and made it conformable to articles, and relieved on the head of mistake, the settlement referring expressly to the articles.

But this was between the parties to the articles and settlement, and their representatives, and *mere volunteers*, and has not been carried into execution against a purchaser (2).

But though it has been done between parties to the articles and settlement, and mere volunteers, yet not against a purchaser.

Secondly, As to the point of notice, whether there is sufficient proof of notice in fact?

There is no pretence of actual notice, and the defendant is only an assignee of a mortgagee.

Mr. *John Hawkins* was agent for Mr. *Warrick* the father, and the original mortgagee, and it was insisted that he had notice by making the mortgage in 1735, and by reason of his preparing a case in which this settlement is recited.

Consider it first in the case of Mrs. *Deborah Westlake* the original mortgagee: A common recovery was suffered in *Trinity* term 1735, probably to enable the father of the plaintiff to borrow money, two months before the time Mrs. *Westlake* lent her money; the court it is said is to presume *Hawkins*, seeing the settlement referred to articles, must have looked into the articles likewise; but Mr. *Hawkins* had notice *as agent to* Mr. *Warrick*, for the case stated for counsel's opinion was only for *Warrick*, not for the mortgagee; this is only constructive notice to Mr. *Hawkins*, and that consequently must create a constructive notice to Mrs. *Westlake*; but she is not before the court, for the assignee of the mortgagee only is be-

(1) See the note to *West* v. *Erissey*, 2 *P. W.* 356.

(2) *Vide Powell* v. *Price*, 2 *P. W.* 539. *Hart* v. *Middlehurst*, *post*, 377. *Senhouse* v. *Earle*. *Amb* 285. *Cordwell* v. *Mackrill*, *Amb* 515. *Vide etiam Goring* v. *Nash*, *ante* 188. note.

fore

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fore the court, ſo that Mr. *Kniveton* ſtands only in the ſecond degree.

The proof as to notice upon the aſſignee is ſtill more light; one witneſs ſwears that he believes *John Hawkins* was concerned for this defendant, becauſe he was at that time *clerk to Hawkins*, and ingroſſed the aſſignment.

I take the caſe to be, that *Hawkins* was concerned on both ſides, which is very frequent in the country.

It would be a pretty harſh thing to affect the lender of the money with all kind of knowledge which the agent may have of the title of borrower; but ſtill I will not lay it down as a general rule, that where the ſame perſon is concerned for the mortgagor and mortgagee, that notice to ſuch perſon will not be good conſtructive notice to the mortgagee.

That notice to affect a purchaſer ſhould be confined to the ſame tranſaction is a rule which ought to be adhered to.

But conſider what kind of notice the defendant *Kniveton* had: Mr. *Hawkins* had not notice at the time of the aſſignment, nor relative to this buſineſs, but before; even before the original mortgage: In the caſe of *Fitzgerald* verſus *Falconberg* (1), it was held, the notice ſhould be in the ſame tranſaction: This rule ought to be adhered to, otherwiſe it would make purchaſers and mortgagees' titles depend altogether on the memory of their counſellors and agents, and oblige them to apply to perſons of leſs eminence as counſel, as not being ſo likely to have notice of former tranſactions.

The notice here was clearly ariſing from that caſe ſtated by *Hawkins* at the requeſt of *Warrick*, in order to do ſomething towards ſuffering a common recovery; and it is a year and ſix months after that *Kniveton* is to be affected with this notice.

It is very probable that *Hawkins* might have forgotten it in this length of time, or which is much more likely, did not underſtand the rule of this court, but took the limitation for *an abſolute eſtate-tail*.

The court will not conſtrue words which make a legal eſtate tail, to be a ſtrict ſettlement, except in the caſe where there are articles as well as a ſettlement.

It is true this court has given relief againſt perſons who claim under the ſettlement and their repreſentatives, but no caſe has gone ſo far as to relieve againſt purchaſers; and though it is true, ignorance of the law does not excuſe, yet there is no caſe, but where there are articles as well as a ſettlement, that the court will conſtrue words which create a legal eſtate-tail, to be carried into ſtrict ſettlement.

Where there are two equities, he who has a ſuperior equity ſhall carry it, and as the ſettlement here was before marriage, the defendant, as a purchaſer, has a ſuperior equity.

If the ſettlement had been made after marriage, it would have been ſtronger for the plaintiff, but as Lord *Cowper* ſaid in a caſe in *Vern.* where there are two equities, he who has a ſuperior equity ſhall carry it; and I am inclined to think, that

(1) *Fitzgib.* 211. S. C. So *Woolly* v. *Earl of Scarborough, poſt.* 392.

as

as the settlement was before marriage, the defendant, as a purchaser, has a superior equity.

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His Lordship dismissed the bill so far as it prays to be relieved against the mortgage, but decreed that the plaintiff might be at liberty to redeem the defendant *Knutton*.

Head versus *Head*, *February* 12, 1745. Case 104.

S. C. 1 Vez. 17. pl. 12. S. C. post. 511. 547.

THE plaintiff, the Lady of Sir *Francis Head*, brought her bill against her husband to establish her separate maintenance, pursuant to an agreement for that purpose, and moved to-day that 600*l.* should be paid her, being a year and half's arrear, at 100*l.* a quarter, to maintain her till the cause is heard.

The foundation for the motion, is, that Sir *Francis Head* in 1740, wrote a letter to Sir *John Boys*, the father of the plaintiff, and in that letter says, that he has a great affection for her; but from her misfortune not her fault, and which neither of them can help, he does not chuse to be a witness of her infirmities, and during the time she lives with her father, will allow her 100*l.* a quarter.

A husband in a letter to his wife's father said, he did not chuse to be a witness to her infirmities, and therefore during the time she lived with her father, would allow her 100*l.* a quarter, the wife having brought a bill for establishing her separate maintenance, moved to be paid 600*l.* being a year and a half arrears, to keep her till the cause is heard, the husband having by his answer sworn, he was desirous of cohabiting with her, the court in directing for the time past a sum of money to be paid her, would not order it as arrears, but 400*l.* in gross, and said they should not direct it for the future.

Sir *Francis Head* by his answer to the bill insists, that he has requested her to come home and cohabit with him, and is extremely desirous of it.

Before the answer came in, which was in *July* last, Lady *Head* upon filing articles of the peace against her husband, obtained an order that he should enter into a recognisance with sureties for his good behaviour.

LORD CHANCELLOR,

The two principal grounds for bills of this kind, are an agreement for maintenance, or a trust for this purpose (1), and in either of these cases the court will entertain a suit for alimony and maintenance, and even after a sentence in the ecclesiastical court for it, when the husband in order to evade it is going out of the kingdom, will, upon a bill filed by the wife, grant a *ne exeat regno*; and I remember a case of *Colemore* versus *Colemore* (2), before Lord Chancellor *King*, where the husband had, after a sentence for alimony, made over his whole estate to trustees, and then went to the *West Indies*; and upon a bill brought by the wife against the trustees, he directed them to pay her a considerable maintenance out of the trust estate whilst the husband resided abroad: As to *Whorwood* versus

When the husband, in order to evade a sentence in the ecclesiastical court for maintenance, is going out of the kingdom, this court, on a bill filed by the wife will grant a *ne exeat regno*.

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(1) *Vide post* 550. (2) S. C. cited *ante* 2 vol. 98.

Whorwood.

HEAD v. HEAD. *Whorwood*, 1 *Ch. Caf.* 250. it was determined during the ufurpation, and while the jurifdiction of the ecclefiaftical court was fufpended.

It has been faid, notwithftanding articles of the peace have been exhibited, and furety given by the hufband, it does not follow that a wife is juftified in living feparate from her hufband.

But it is an excufe at leaft for keeping from him for fome time, till their paffions might be fuppofed to fubfide, and they had a profpect from the interpofition of friends to live happily together; and this in the prefent cafe weighs with me, in directing for the time paft a fum of money to be paid her, but I will not order it as arrears, but in a grofs fum; for as the hufband does by his anfwer fwear, that he is very defirous of cohabiting with her, and that he has frequently applied to her to come home, I will not direct it for the future, but only that 400*l.* fhall be paid her (1), which is a year's allowance, according to the offer in the letter to Lady *Head*'s father, for I do not think her intitled to 600*l.* which fhe prays by her motion, becaufe the anfwer has been put in above half a year, in which he offers to cohabit with her.

This is not making a decree, as has been faid, before the hearing, but only doing what the hufband himfelf is obliged to do, maintain the wife till the caufe is heard upon the merits; and what I fay now is abftracted entirely from any decree the court may think proper to make, if there fhould not then appear to be a foundation for the agreement fet up by the bill.

After a decree for a feparate maintenance, if a hufband offers to cohabit with his wife, the court have refufed to continue it.

There are inftances where, notwithftanding an abfolute decree for a feparate maintenance, yet afterwards upon the circumftance of the hufband's confenting to cohabit with her, and promifing to ufe her kindly, the court have refufed to continue the feparate maintenance.

(1) *Reg. Lib. A.* 1745 fol. 164.

Cafe 105. *Firft Seal after Hilary Term, February* 19, 1745.

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After the plaintiff at law had obtained judgment againft *P.* and an award of execution on the *fcire facias* to revive a judgment; *P.* obtains an injunction on the common term of giving a *releafe of errors*, and afterwards brings a writ of error in the Exchequer-chamber, *this is a breach of the order, and a contempt of the court.*

THE Marquis of *Powis* (after the plaintiff at law had obtained judgment againft him, and an award of execution upon the *fcire facias*, to revive the judgment) obtained an injunction in this court, upon the common terms of giving a releafe of errors.

My Lord *Powis* has brought a writ of error in the exchequer-chamber upon the *fcire facias*; and the defendant in error, has pleaded the releafe of errors given by the plaintiff in error, and has likewife moved in this court againft Lord *Powis* for a con-

contempt, in disobeying the order of the court for release of errors.

The question is, Whether the release of errors shall be confined to the original judgment, or whether it shall be extended to errors in the award of execution on the *scire facias*.

LORD CHANCELLOR,

I am of opinion, that if it had been given immediately after judgment entered and before the *scire facias* was taken out, the words in the common form of release of errors relating to time past, as *had done and suffered*, must be confined to such actions or judgment as are already accrued, and bringing a writ of error upon an award of execution on a *scire facias* to revive that judgment, would not be a breach of the order and a contempt of the court.

Where a release of errors is given immediately after judgment entered, and before the *scire facias* taken out, the words *had, done and suffered* in the release, must be confined to such actions, &c. as are already accrued, and bringing a writ of error on the *scire facias* would not be a contempt of the court.

But, in the present case, as the release of errors is after the *award of execution on the* scire facias, there are words in the release, as *warrant*, *process*, &c. that will extend to make it a release of errors upon the award of execution.

In the case in 1 *Mod.* 79. Lord *Hale* was of opinion, a writ of error would lie in the exchequer-chamber of a judgment on a *scire facias*, grounded upon a judgment in one of the actions mentioned in 27 *Eliz. c.* 8. because it is in effect a piece or parcel of one of the actions therein mentioned; but in the case of *Hartop* versus *Holt*, 5 *Mod.* 229. the court were of opinion, the design of this act of parliament was to give a writ of error upon the merits of the case; but here the right is determined, and the writ of error is brought upon the award of execution, so that the exchequer-chamber have no authority after they have affirmed the first judgment, therefore the writ of error is no *supersedeas* (1).

After the exchequer-chamber have affirmed the first judgment, they have no authority, and a writ of error brought there upon the award of execution would be no *supersedeas*.

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In consideration of this release being as long ago as 1731, I will not consider the breach of the order as a contempt of the court, but direct that the Marquis of *Powis*'s proceedings on the writ of error should be stayed.

The release being in 1731, the court would not consider it as a contempt, but directed only the proceedings on the writ of error should be stayed.

(1) *Vide Loyd* v. *Skutt*, *Dougl.* 350.

Ekin versus *Pigot*, *March* 3, 1745. Case 105.

THE bill was brought for tithes in kind of the manor of *Dodeshall* in the parish of *Quainton*.

A modus being worth as much as the manor itself in Queen *Elizabeth*'s time, was thought too rank, and consequently could not be time out of mind.

The

ERIN v. PIGOT.

The defendant insists upon a *modus* of 48*l.* in lieu of all tithes for that manor.

The plaintiff's counsel insisted it was too rank, for the whole rectory was worth but 33 *l.* a year in *Hen.* the 8th's time, and the whole demesne lands of that manor in Queen *Elizabeth's* time, were worth but 48 *l per ann.* so that the *modus* was full as much as the manor itself.

Mr. *Mills*, for the defendant, cited *Chapman* versus *Monson*, 2 *P. Wms.* 565.

The plaintiff proved as exhibits the value of the first fruits from a return made by the augmentation-office, and for the value of the manor an *inquisition post mortem.*

LORD CHANCELLOR,

There must be some ground of law upon which to support payments in lieu of tithes.

There is no person more unwilling than I am to set aside such payments in lieu of tithes, but there must be some ground of law upon which to support such payment.

The first objection was of its being too rank a *modus*, and consequently could not be time out of mind, for the manor is now but 80*l. per annum*, and according to the natural improvement of lands from *Hen.* the 8th's time, it ought to have been ten times as much, on account of money sinking in its value, and lands rising in theirs.

The returns from the first-fruits office, and the inquisition *post mortem*, though they are not conclusive evidence, yet sufficient upon the circumstances of this case, because the defendant has not produced any evidence to contradict it.

This is a mere personal payment upon a composition, submitted to by the parsons in succession, from time to time, and differs from a composition real, which is a charge upon lands under a deed to which himself, the patron, and ordinary are parties.

* Taking all the evidence together, this appears to be nothing more than a composition upon agreement, which parsons have submitted to in succession from time to time, and is merely a personal payment, not a composition real, which is some charge given to a parson upon lands, under a deed to which himself, the patron, and ordinary are parties, and of a different nature from this.

[299] The plaintiff therefore must have a decree for tithes in kind (1).

(1) *Reg. Lib. A.* 1745. fol. 275.

Case 107. *Androvin and Others* versus *Poilblanc and Others, March* 7, 1745.

S. P. being dead in the testator's life-time, what is given to her is a lapsed legacy, and the executor being a trustee only, it must be divided according to the statute of distributions; two thirds to the testator's two sisters, and the remaining third of this third to S. P. the only child of the testator's brother.

MR. *Henry Poilblanc*, by a *French* will, after giving particular legacies, says, "As to all the rest of other "goods, moveable and immoveable, actions, credits and other

"effects, which he shall leave behind him, whether in this "country, or in *England*, nothing excepted or reserved, the "said testator hath named, instituted and established for his "only and universal heiresses Mrs. *Susan Poilblanc* his sister for "one third, and Mrs. *Mary Poilblanc*, widow of the late *John Elin*, his sister also, for one third, and in case of her decease be-"fore him, her children, or descendants by representation, in "her room or place, for them to dispose of freely at their good "pleasure, and as effects belonging to them; and as to the last "remaining third of all his said effects, the testator wills "and intends, that the amount of that shall remain entire "in the hands, power and direction of his said elder sister "Mrs. *Susan Poilblanc*, for her to enjoy the profits and interest "thereof during her life, and after her death, the capital of the "last third of his effects shall be inherited by the child or child-"ren of Mr. *John Poilblanc* his brother, that shall be out of the "kingdom of *France* at the time of the death of his sister Mrs. "*Susan Poilblanc*, which said child or children of his said brother, "which shall be out of the kingdom at the time of the death of "his said sister, he institutes for his heirs, or heir, in the pro-"perty of the said remaining third, and the capital, wheresoever "it be, to take and dispose of in that case, at their good pleasure, "as their own proper goods.

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"And lastly, that his present testament may be well execut-"ed, the testator hath named and appointed for his executor "thereof Mr. *Lewis La Conde* of *London*, merchant, his friend, "giving him in that quality all and as full power and authority as "can be given to a testamentary executor."

Mrs. *Susan Poilblanc* dying in the testator's life-time, the plaintiffs, who are the sisters of the testator, and his next of kin, have brought their bill to have so much as was devised to her under the will distributed, it being a lapsed legacy. [300]

The defendant, the executor, insists, that he is intitled to it both in law and equity, *quasi* executor.

Mr. Attorney General, counsel for the plaintiffs, to shew that where a legacy is lapsed, the next of kin shall have it, and not the executor, cited *Page* versus *Page*, before Lord Chancellor *King*, 2 *P. Wms.* 489. and *Powell* versus *Owen*, 1728, before Lord *Hardwicke*,

Mr. *Sambourne*, of the same side, cited *Bagwell* versus *Dry*, 1 *P. Wms.* 700.

LORD CHANCELLOR,

What we call executor and residuary legatee is, in the civil law, *universal heir*, and these words, by that law, would have intitled the sisters, as being made universal heirs, of all his goods and chattels, to have proved the will, if no executor had been appointed, which is the strength of the case, and makes a very plain one for the plaintiffs.

Executor and residuary legatee in our law is, what the civil law calls *universal heirs*, and the sisters being so made would have been intitled to prove the will, if no executor had been appointed.

ANDROVIN v. POLLBLANC.

If a legacy is given to an executor, which shews he should not take the whole, as he has a part of the estate, the next of kin shall be entitled to have it distributed (1).

It is certain where an executor is named in a will, and nothing more is said, he is at law intitled, and in this court, to the residue; but if a legacy is given him, which shews he should not take the whole, as he has a part of the estate, the next of kin of the testator shall be entitled to have it distributed upon the foot of the statute of distributions.

It is the ground too of all the cases, of excluding the executor, that he is only named for the sake of executing the will, and to have the trouble, and not any benefit.

If an executor is considered as a trustee by construction and inference, where a special or general legacy is given, much more when the testator declares him to be a trustee (2).

[301] The case of *Bagwell* versus *Dry*, in 1 *P. Wms*, is expresly in point, and therefore brings it to that question, whether the nominating him executor is not nominating him in trust. *

It is true, the sisters take it in thirds, but if he had done no more, as he has named them universal heirs, they would have been intitled to the probate of the will.

Hæres testamentarius, as to goods, the term in the civil law, and executor a barbarous expression unknown to that law.

For the proper term in the civil law, as to goods, is, *hæres testamentarius*, and executor is a barbarous term unknown to that law, therefore, a person named as *universal heir*, in a will, in my opinion, would have a right to go to the ecclesiastical court for the probate.

Therefore, by naming other persons *universal heirs*, he has divided the authority from the interest, *quoad the executor*.

What is the meaning of this? Why, naming him is nothing but as an instrument, and to give him barely the authority of an executor, without any interest, and the facts explain it; for, as the sisters lived abroad, the testator found it necessary to vest the authority in somebody in *England*, for what? Why, merely for the purpose of executing his will here.

Mr. *Br*—*r*'s objection was, that though he has named them *universal heirs*, yet he has named them so in thirds only; and being tenants in common it could not survive to the other two, and therefore the executor by general right is intitled.

To be sure, the law of *England* is so, but as the executor, by the words of this will, is clearly only an instrument, he can take nothing beneficially, and therefore it goes to the next of kin.

His Lordship decreed, that *Susan Pollblanc* being dead in the testator's life-time, it is a lapsed legacy as to her, and must be divided according to the statute of distributions (the executor being only a trustee) *per capita*, two thirds thereof to the plaintiffs

(1) *Graydon* v. *Hicks*, *ante* 2 vol. 18.

(2) See Mr. Cox's note to *Farrington* v. *Knightley*, 1. P. W. 550.

* One devises the surplus of his personal estate to four equally, and leaves *J. S.* executor in trust, one of the four dies in the life of the testator, his share, as to so much of the testator's estate undisposed of by his will, shall go according to the statute of distribution, and not to the executor, he being a bare trustee for the next of kin. *Bagwell* versus *Dry*, 1 *P. Wms.* 700.

tiffs (1), *testator's two sisters*, and the remaining third of this third to the defendant *Susan Poilblanc*, one of the children of *John Poilblanc*, the testator's brother, (2). ANDROVIN v. POILBLANC.

(1) Who were the two children of the testator's sister *Mary Poilblanc*.

(2) *Reg. Lib. A* 1745. fol. 283.

Aston versus *Aston*. *The third Seal after Hilary Term*, 1745. Case 108.

[302]

A Motion was made on behalf of *Harvey Aston* against Lady *Aston*, to deliver up one part of a marriage settlement, she admitting she had two; and that in the settlement *Harvey Aston*'s wife is in the remainder.

A jointress had her own part of a marriage settlement in her custody, and came to the possession of the husband's as his executor; ordered to be produced before the clerk in court, but would not, upon motion, direct it to be delivered up, it being the very end of the bill.

She had her own part in her own custody, and came into the possession of her husband's, as his executor, and indorsed with his hand, this is my part of the settlement.

LORD CHANCELLOR,

I will order it to be produced before the clerk in court, but cannot, upon motion, direct it to be delivered up, because this is the very end of the bill.

It is like the case of a purchaser, who, if he denies notice, need only set forth the purchase deed; but may plead his purchase in bar to the discovery of the title deeds; for a purchaser may, subsequent to his purchase, have found out a defect in his title, and if he should produce title deeds, they might make use of them to overturn his title at law.

A purchaser, if he denies notice, need only set forth the purchase deed, and plead his purchase in bar to the discovery of the title deeds.

There is no occasion to offer to confirm her title to the jointure (1), for they both claim under the same deed, and because it must appear what their title is, before it can be confirmed, but that will not extend to a precedent title deed, where the person had a precedent estate-tail.

A jointress ought to produce her jointure deed, and a purchaser his purchase deed, that it may be seen whether the lands they claim are comprised in their deeds.

A jointress, or a purchaser ought to produce their deeds, to see if the lands they claim are comprised in them.

(1) *Vide Chamberlain* v. *Knapp*, *ante* 1 vol. 52. and the [illegible] note there.

Case 109. *Hanley* versus *Simpson*, *March*, 15, 1745. *In the Paper of Pleas and Demurrers.*

Where a bill not only impeaches an account, but charges the plaintiff has no counterpart, if the defendant pleads a stated account, he must annex it to his answer.

LORD CHANCELLOR,

WHERE a bill is brought to impeach an account, and the defendant pleads *a stated account*, it is not necessary in every case that the account should be annexed by way of schedule to the answer, for the plea is sufficient in case it be a fair account, between the parties; but, in the present case, the bill not only impeaches the account, but charges the plaintiff has no counterpart of the account, and prays it may be set forth.

The defendant pleads a stated account, without annexing it to his answer, so that if there were errors upon the face of it, the plaintiff could have no opportunity of pointing them out; and for this reason, he ordered the defendant's plea to stand for an answer, with liberty to except (1).

(1) See *Dawson* v. *Dawson*, *ante* 1 vol. 1. note 1.

Case 110. *Hildyard* versus *Cressy*, *March* 15, 1745.

The original bill brought for discovery only, the amended bill prays relief; the answer to this is to be considered as a part of the answer to the original bill as much as if ingrossed in the same parchment, and a part of the same record.

THE defendant pleaded a fine and non-claim to a bill brought by an heir at law, for discovery whether the defendant was a purchaser for valuable consideration.

The plaintiff came of age in *December* 1734, and brought his bill of discovery the *June* before; he amended the bill several times, but did not till 1745, amend, and pray relief.

Mr. *Cressy* levied the fine in 1738, and all the deeds were in the hands of this defendant, as attorney to the plaintiff.

LORD CHANCELLOR,

When the defendant put in an answer to the amended bill which prayed relief, he could not put in a complete answer over again, but only refer to the former answer; for if he had done otherwise, it would have been referred for impertinence; and therefore this last answer is to be considered as a part of the answer to the original bill for discovery, as much as if it had been engrossed in the same parchment, and a part of the same record.

If, at the hearing of this cause, the defendant should not have supported his plea by the answer, the plaintiff may counterprove by reading any part of that answer, and by that means overturn the plea.

[304] Does it not equally hold at the time of arguing the plea? that the plaintiff may counterprove by reading a passage out of the defendant's answer, to shew he had not sufficiently supported his plea.

Upon

Upon reading the passages out of the answer, Lord Chancellor was of opinion, he had not made a complete answer to the discovery, and therefore, not having properly supported his plea, he ordered the plea to stand for an answer only, with liberty to except.

HILDYARD v. CRESSY.

Hardingham versus *Nichells*, *March* 15, 1745. Case 111.

A Bill was brought to be let into the possession of an estate, the defendant pleaded a purchase for a valuable consideration, and that the money was paid, or is *bona fide secured to be paid*.

To a bill for possession, a purchase for a valuable consideration is pleaded, and that the money is *bona fide* secured to be paid, being only secured, may never be paid, and the plea therefore over-ruled.

The fact is, that the consideration money was never paid, but only secured to be paid.

LORD CHANCELLOR,

The defendant has not paid the money yet, and therefore, as he has notice now of the plaintiff's title, the money he has only secured to be paid, may never be paid, and consequently the plea must be over ruled (1).

(1) *Vide Fitzgerald* v. *Burk*, *ante* 2 vol. 397. *Story* v. *Lord Windsor*, *ante* 2 vol. 630.

Smith versus *Smith*, *in the Cause Petitions*, *March* 24, 1745. Case 112.

A Petition was preferred by Mrs. *Smith*, on behalf of her daughter Miss *Smith*, devisee of a very large real estate under her father's will (1), against Mr. *Barry*, fourth son of Lord *Barrimore*, that the court may restrain him from marrying her daughter, being an infant, and a ward of this court, or to make such other order as his Lordship shall think fit.

A mother petitioned, that Mr. *Barry* may be restrained from marrying her daughter, being an infant, and a ward of this court; ordered, as he is likewise an infant, that his guardian shall not permit him to marry the young lady, without the leave of the court (2).

LORD CHANCELLOR,

This care of infants has been exercised by the court in different degrees and instances.

Upon the cessure of *the court of wards*, the care of the government of infants reverted to this court, to whom it originally belonged, and in respect of lunaticks, ideots, and infants,

The care of infant reverted to this court on the cessure of the court of wards.

(1) Miss *Smith* was intitled to this estate under a settlement; subject to a proviso restraining her from marrying without her mother's consent.

(2) *Vide Lady Catherine Annesley's* case, cited 2 *P. W.* 112, *Lord Raymond's* case, *Ca. temp. Talb.* 58. *Beard* v *Travers* 1 *Vez* 313.

SMITH v. SMITH.

the king is bound to take care of them; It is not a profitable jurisdiction of the crown, but for the benefit of infants themselves, who must have some common parent.

Exercised sometimes by way of punishment on such as have done an act to the prejudice of infants, but more usefully to restrain persons from doing an act to disparage them where it has not yet been completed.

This jurisdiction is exercised by way of punishment, sometimes on such as have done any act to the prejudice of infants; and likewise more usefully exercised to restrain persons from doing any thing to disparage infants, where the act has not yet been completed.

The person against whom this petition is prayed, has not in respect of family and quality disparaged her; but then there is another objection arises, from a great inequality of portion and fortune between this young lady and Mr. *Barry*.

Though this is not the material ingredient in the happiness of the married life, yet parents always take care that such provision shall be made of this kind, as will enable infants to live in the world suitable to that rank to which their birth intitles them.

If the Master, to whom it is referred [illegible] if a [illegible] proposed is proper, reports it improper, the court will not give the infant leave to marry.

The crown therefore acts by way of analogy to the care and prudence of the natural parent, and for this reason, when infants under the care of this court are upon a treaty of marriage, the court refers it to a Master to see, whether the settlement proposed is proper? if improper, the court will not give the infant leave to marry.

As the court has then, by great variety of orders, exercised this authority, it brings on the present question, whether this is a case fit for the court to interfere in?

The addresses of Mr. *Barry* have been carried on very improperly, begun when the lady was very young, and even in the lifetime of her father: Complaints made by the father to Lord *Barrimore* of his son's behaviour, Lord *Barrimore*, by a letter to Mr. *Smith*, promises his son shall never attempt an address of this kind for the future.

The father is dead, but has appointed testamentary guardians to his daughters, and given this lady and her sister the inheritance of 8000*l.* a year, upon condition, if they marry under age, that it must be with consent of their mother, and the testamentary guardians; so that the father has not only intrusted them with the common care as guardians, but has shewn his intention and desire they should be consulted on marriage, and a previous consent from them obtained.

Notwithstanding Lord *Barrimore*'s letter to Mr. *Smith*, the young lady frequently met Mr. *Barry* at Lord *Barrimore*'s house, and many messages from Mr. *Barry* were carried by Lord *Barrimore*'s servants to the young Lady, and the facts are not contradicted by Mr. *Barry*, or Lord or Lady *Barrimore*; so that it appears uncontroverted that this was disapproved of by her father in his life time, and disapproved of by Lord *Barrimore* likewise; and yet since her father's death this affair has been taken up and carried on by Lord *Barrimore*, and not one of the circum-

stances

ſtances charged by the affidavit of Mrs. *Smith* and others in ſupport of the petition denied by Mr. *Barry*, or Lord or Lady *Barrimore*. SMITH v. SMITH.

The firſt prayer of the petition is for an order on Mr. *Barry* not to marry the young Lady without the leave of the court.

All theſe orders import only during her minority, for to be ſure at the age of twenty-one ſhe is *ſui juris*, and at her own diſpoſal.

The counſel for Mr. *Barry* do not object to ſuch an order; and even if it was a general order, yet it would affect every body, and whoever ſhould preſume to marry her, would incur a contempt of the court; but when there is an application againſt any particular perſon to reſtrain him from marrying an infant, it is uſual to inſert his name in the order.

A general order of reſtriction affects every body and whoever ſhould marry the infant afterwards incurs a contempt of the court.

The petition prays ſecondly, that all letters containing or importing any promiſe of marriage ſhould be produced.

It has been inſiſted by Mr. *Barry's* counſel, that no ſuch order has ever been made by the court.

I cannot ſay I do remember any ſuch order, but I have no doubt of the court's having a power of making ſuch a one, when a perſon obtains a promiſe in writing to bind down infants, whilſt under the care of the court.

It is very true, a promiſe of an infant under age will not bind the infant, and ſo laid down in the caſe of *Holt* verſus *Ward* in the court of king's bench, (*vide Fitz-Gibbons's Rep.* 175 and 275.) It was inſiſted there the infant could not ſupport an action on a promiſe of marriage, the court was extremely doubtful, but were convinced by the argument of Mr. *Reeves*, afterwards Lord Chief Juſtice of the court of Common Pleas; and indeed it was a very fine one, and is the beſt report in *Fitz-Gibbons's* book *.

As to the rules and method of practice in ſuch a caſe in the eccleſiaſtical court, that was not abſolutely determined in the court of King's Bench, but rather taken to be in this manner. [307]

Upon a contract of marriage *in futuro* the eccleſiaſtical court can only puniſh the party, *pro læſione fidei*, but cannot decree a performance of conjugal rites (1).

But be that as it will, and that it is only voidable; yet does not ſuch a behaviour as Mr *Barry's* tend to entangle an infant, and to prevent her from marrying advantageouſly, where a proper match offers? and in ſhort, nothing can tend more to her prejudice than ſuffering her to be inſnared and drawn in to enter into ſuch engagements during her infancy, and therefore it is high-

* *If a man of full age and a female of 15 promiſe to intermarry*, and afterwards he marries another, an action lies againſt him for though ſuch marriage may be ſaid to be voidable as to the infant, yet it ſhall be binding on the perſon of full age, who ſhall be preſumed to have acted with ſufficient caution, otherwiſe this privilege allowed infants of reſcinding and breaking through their contract, which was intended as an advantage to them, might turn greatly to their prejudice. *New Abr.* 3 vol 574. *Holt* verſus *Ward*, *Trin* 5 *Geo.* 2. 2 *Str.* 850. 937. *Barnard B. R.* 271. 2 *Barnard B. R.* 12, 173, 176.

(1) *Vide Harg. Co. Litt.* 79. b. notes 2. and 4.

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ly incumbent on the court to see what steps have been taken to insnare her.

Though infants at the age of *fourteen* if a male, and of *twelve* if a female, are capable of entering into contracts of marriage; yet by the canons of 1603, it cannot be done without the consent of parents.

For notwithstanding a female of twelve years of age is capable of contracting marriage, the canons in 1603 are expresly against infants marrying without consent of parents, and a licence cannot be had without an oath of the parents or guardians consent, notwithstanding infants are capable of entering into contracts of marriage in the notion of law at the age of fourteen and twelve.

The court directed Mr. *Barry* to produce such letters as contained a promise of marriage. *N. B. It was said by counsel to be the first instance of such an order.* Lord *Hardwicke* refuted the offer of looking into them as a private Gentleman, because it would not have been a knowledge to him in his judicial capacity.

I will order Mr. *Barry* to produce such letters as contain a promise of marriage, but not *billet doux* or letters of civility; for as *a letter* may contain as strong a promise as a note in writing, therefore it must be produced: And Mrs. *Smith* shall likewise be allowed to examine Mr. *Barry* on interrogatories; it has been offered by Mr. *Barry*'s counsel, that I shall look into them as a private Gentleman, but that will not be a knowledge to me in my judicial capacity, and therefore of no use.

The affidavit of Mr. *Barry* mentions other letters of like import and effect, but that is not satisfactory, therefore they must be produced likewise.

It has been objected by Mr. *Barry*'s counsel, that the letter mentioned in Mr. *Barry*'s affidavit was wrote before the filing of the bill, and therefore is not a matter for the cognizance of the court: supposing it was before filing of the bill; this is a very nice distinction, for if such an affair has been carried on privately and clandestinely, without the knowledge of the mother of the young lady, and the testamentary guardians, I shall take it as one entire transaction, in order to draw in the infant to an improper act: it might be done too when there was a prospect of such a bill; therefore this court ought not to put it upon such a narrow point as this is: and it is very probable too this letter was delivered to Lord *Barrymore* after this petition lodged.

[308] So far as relates to the promise of marriage, Lord *Barrimore* has no business with the letter delivered to him by the son's solicitor, the custody of the solicitor is the custody of Mr. *Barry*; this is a kind of management too I do not approve.

Lord and Lady *Barrymore* are not mentioned in the prayer of the petition, nor served with notice, therefore are not before the court; but tho' I cannot make an order *nominatim* on Lord *Barrymore*, yet I will make an order as Mr. *Barry* is allowed to be an infant, that whoever has a power over him as guardian, shall not permit him to marry the young lady without leave of the court; and do direct that all letters importing a marriage shall be produced

produced before a Master, and that Mrs. *Smith* be at liberty to examine Mr. *Barry* on interrogatories (1). SMITH v. SMITH.

(1) *Reg. Lib. B.* 1745. fol. 203.

In the Lunacy of Mr. Roberts, March 25, 1746. Case 113.

S. C. Ante 5. Not only the lunatick, but the heir of the lunatick is bound upon the traverse of the inquisition (1).

THIS matter came on before the court upon exceptions to the Master's report, which approved of the conveyance of the estate in *Barbadoes* to Sir *Stephen Anderson* from Doctor *Finny*, pursuant to Lord Chancellor's order.

Before the last order was carried into execution, *Roberts* died.

The conveyance is by lease and release to such uses as subsisted under the will of Mr. *Roberts*'s father, in which Sir *Stephen Anderson* is the last remainder-man.

Exceptions are taken by the heir at law of Mr. *Roberts*, and the most material is, that the conveyance ought to have been made to *Henry Roberts* the lunatick in fee.

Mr. *Noel* for the exceptant, the heir at law of Mr. *Roberts*.

The intent of these exceptions, is to leave the heir at law at liberty, without any previous order of the court to come to a judicial determination of this point, either by traversing the inquisition, or in any other manner, whether he is intitled to the fee, or whether Sir *Stephen Anderson* is intitled as last remainder-man under the will of Mr. *Roberts*'s father.

He argued, that this court will not consider the inquisition as an absolute determination of the right of inheritance of the lunatick's estate, and though he could not cite a precedent, yet submitted it upon general rules of reason and justice, that an heir at law may traverse an inquisition, and that the court will not bind him down without a judicial determination of the point.

That if Doctor *Finny* could not have been bound by the inquisition, unless he had agreed previous to it to be bound, much more the heir at law, who has not entered into any such agreement, cannot be bound. He cited Sir *Geoffry Palmer*, Attorney General on the behalf of *Jerome Smith* against *Sir Robert Packhurst*, 1 *Ch. Cas.* 112, 113. [309]

In all judgments against the ancestor the heir has the benefit of a writ of error, or appeal; then why should he be barred here, when this is a proceeding only found upon the prerogative of the crown?

It was but a limited insanity found by the jury, *that Mr. Roberts was not of capacity sufficient to manage his own affairs.*

A great inconvenience would follow, if the property of persons should be bound in this summary way by order of this court, and will be the first precedent of this kind; and all

(1) *Vide ex parte Grimstone, Amb.* 706.

that

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that is asked is to have an opportunity of trying the fact of the lunacy.

Mr. *Wilbraham*, counsel of the same side, said, we do not desire an immediate conveyance to the acceptant the heir at law, but only to some officer of the court, to the use of such persons as may hereafter turn out to be intitled.

By the *St. de Prærogat. Regis*, 17 *Edw.* 2. *c.* 10. It is a sort of office to intitle the King to lay his hands upon the person and estate of a lunatick; and though the King cannot be properly called a trustee (1), yet in this case he is *quasi* a trustee for the lunatick's benefit only; for it is there said, *the King shall take nothing to his own use.*

There is nothing in this inquisition that can affect the right of a lunatick to the estate. *Vide Guttini* versus *Brown*, 1 *Ch. Cas.* 49. that a fine shall not work further than the court intended it; the same rule rule will hold as to the order made in this case.

As to the order's being conclusive: Consider first, how it would be in point of law; this concerns freehold.

If a man has a judgment against him, on demurrer, he is barred in a personal action, and can only have a taint or writ of error; but otherwise in freehold. *Vide* 6 *Co.* 7, *b.*

He can have no attaint here, because it is in the case of the crown. 4 *Leon* 46. *Anon.*

[310] The common law will not allow a man to be barred of his freehold, till the mere right has been tried.

In the case of *Addison* versus *Dawson*, *June* 24, 1711, as appears by the Register's book, for the note in *Vernon's Reports*, 2 *vol.* 678. is imperfect, It was said, that though a person is found a lunatick with a retrospect of several years back; yet if any conveyances are executed by a lunatick after this time, they shall not be set aside as to good uses; and yet they are looked upon as bad, and the effects of a recovery bad, where the uses are bad.

LORD CHANCELLOR,

There was a fine in that case, and therefore the lunatick was bound, as it must be supposed when he was examined with regard to the fine by the judge, that he was capable of levying.

Mr. Attorney General for the remainder-man under the will of Mr. *Roberts*'s father.

First, Whether the exceptant has any right as heir at law.

He can claim it only as heir at law upon the supposition that Mr. *Roberts* was seised in fee at the time of his death.

He could not be seised in fee at the time of his death, and the only reason that has been urged to shew he was, is, that the settlement made by Mr. *Roberts* in 1738, has barred the remainder to Sir *Stephen Anderson.*

The heir can have no legal right, for either Mr. *Roberts* was or was not a lunatick; if he was, the deed executed by him in 1738, is no bar of the remainder-man; if he was not, Doctor *Finny* has the whole inheritance, and there is no pretence of right in the heir at law.

(1) *Vide Penn* v. Lord *Baltimore*, 1 *Vef.* 453.

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The proceedings in this lunacy are binding upon the heir at law.

By the statute of *Edw.* 6. *c.* 8. *f.* 6. there is a liberty to traverse, but when that liberty has been once taken, there is an end of it, for the lunatick cannot traverse it again.

Mr. *Roberts* could never have traversed it, by saying he was not a lunatick at the time the jury have found him one. *Vide Beverley*'s case, 4 *Co.* 123. *b.*

It has been finally determined, and there is no way of trying it now, and cannot be controverted over again by the heir at law.

Mr. Solicitor General of the same side. [311]

The general question is upon the order made in *December* 1745.

The ground of the order was not, that Doctor *Finny* really could convey any thing, but only to preclude him from ever trying it over again, that *Henry Roberts* was a lunatick at the time of executing the deed in 1738.

In answer to Mr. *Wilbraham*'s observation that a deed of his may be good to good uses, and bad to bad; he cited *Leach* versus *Thomson*, 3 *Mod.* 310. and the same in *Shower's Parl. Cas.* 150.

The single question is, Whether a deed executed by a lunatick is void or voidable; Judges have been of opinion it is absolutely void, and not voidable only.

If the deed is so far a void act that it does not grant to Doctor *Finny*, it does not bar an estate-tail; for if he was a lunatick at that time, there was no deed at all.

Mr. *Clerk* of the same side, cited *Mansfield*'s case, 12 *Co.* 124. where there was a fine by an ideot.

"And resolved in the court of Wards, that forasmuch as he "was enabled by the fine as a principal, he shall not be disabled "to limit the uses, which are but as accessory; and notwith-"standing Lord *Dyer* said, that the Judge who took the fine was never worthy to take another; and altho' the monstrous deformity and ideocy of *Bassley*, who acknowledged the fine, was apparent and visible to the Judges of the Common Pleas, and the jurors, to whom he was sent out of the court of Wards, yet they caused a juror to be withdrawn, by consent of parties, and held the fine to be good."

Mr. *Noel* in reply said, he apprehended the court would not put such a construction upon their order made on Doctor *Finny*, as to conclude the rights between Sir *Stephen Anderson* and the heir at law of Mr. *Roberts*.

LORD CHANCELLOR,

Lane's Entries 652. is the only traverse of a lunacy in print; and there is expresly the traverse of a person supposed *to be a lunatick* at the time.

The only traverse of a lunacy in print is in *Lane's Entries*.

I think I may decide on some sure and certain principles on this exception, without prejudicing any person's right.

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The question is, whether I shall leave Doctor *Finny* a power of disputing it, if he thinks fit, by reason of his not having done an act to extinguish his right. *

The exception is mistaken, for the course of this proceeding was to shew, whether Mr. *Roberts* was a lunatick or not, and whether Doctor *Finny* had any right to the estate; for to suppose that deed was void, and yet in force at the same time, would be inconsistent; this being the intent of the order to prevent the trying the lunacy over again in *Barbadoes*, it does not imply the court admitted Doctor *Finny* to have a right.

I am of opinion not only the lunatick, but the heir of the lunatick, is bound upon *the traverse of the inquisition*, or it would have been a very fruitless act of parliament.

A trial by inspection is the proper trial by the Lord Chancellor as to his person; when there has been a solemn trial in the life-time of a lunatick, who is bound himself; to say, that after his death, when he cannot appear in proper person, and cannot be inspected by the jury, it should still be open to a traverse by the heir at law, carries a great absurdity with it.

Where the alienee and the lunatick traverse, if he is found a lunatick at the time of the alienation, the alienee is bound.

The alienee of a lunatick may traverse an inquisition as well as the lunatick himself; suppose both the lunatick and the alienee traverse, and he is found a lunatick at the time of the alienation, is not the alienee bound? He certainly is.

The alienee it is said shall be bound, because he was a party to the suit, but the heir at law shall not, which would be a manifest injustice, and still stronger in the case of ideocy, where the crown grants the custody and profits of his estate during his life, the ideot dies, and, according to the doctrine laid down by counsel, the heir at law may come in and traverse the ideocy: shall the executor of an ideot have an account against the grantee for the profits incurred during the grant from the crown? No surely.

The lunatick it is said would not be bound, because when he recovers his senses he may traverse it; certainly he could not.

Though I have said all this upon the general point that the heir at law is bound, yet if Mr. *Roberts* was really a lunatick at the time of the deed, it is absolutely void; if void so as not to pass the estate, it is equally void so as not to bar the entail.

[313] But suppose a common recovery might have a distinct operation from the deed to lead the uses, for a common recovery will bar the entail, though there is no deed to lead the uses, because it is in respect *of the satisfaction of estate in value*, which creates the bar; yet if such a deed as this does not pass the estate, then the deed can have no operation as a recovery of an estate in satisfaction: here it is quite a distinct thing from the common recovery, for it all depends upon *a letter of attorney* executed by the lunatick, which is a deed, and therefore every thing done in pursuance of it is void: and this was determined in the case of

 Wentworth

Wentworth versus *Cholmley* in the cout of Common Pleas, *Michaelmas* term 1744. (1). ROBERTS's Case.

But I will suppose *Roberts* was not a lunatick, and that on a future bill brought here, *Roberts* should be found not to be a lunatick, but a weak man, and the deed obtained by fraud or imposition: after the death of Mr. *Roberts*, the court must take it exactly in the same light as it stood before his conveyance; if Doctor *Finny* gained no right by this deed, he can convey nothing to the trustee under the order of this court, therefore the heir at law is not hurt.

But supposing the entail is barred, those uses are now subsisting, and no prejudice can arise from the conveyance directed by the Master, his Lordship over-ruled the exception, but not so as to prevent any right the heir at law may appear to have on trial at law.

(1) S. C. 2 *Atk.* 403. cited.

Anon. *Easter Term*, 1745. Case 114.

A Bill was brought for a redemption of a mortgage.

Lord Chancellor set out with saying, that he thought the rule in relation to redemptions, which had been established in this court for some time, and which was analogous to the statute of limitations, is a very right and proper rule; that after twenty years possession of the mortgagee, he should not be disturbed, or otherwise it would make property very precarious, and a mortgagee would be no more than a bailiff to the mortgagor, and subject to an account; which would be a great hardship.

The rule in relation to redemptions, established here by way of analogy to the statute of limitations, that after 20 years possession a mortgagee should not be disturbed, is a very right and proper one (1).

But on the other hand, I never heard of the rules that Mr. *Clark* has insisted on for the defendant, that whoever comes for a redemption must shew a disability in the owner of the equity of redemption to come sooner; and secondly, though the court should be satisfied in this respect, yet they will not decree a redemption, where it would subject the mortgagee to great inconvenience in taking the account.

I do not know these rules have ever been established here, but if the court decree a redemption, they provide as well as they can against laying the mortgagee under inconvenience in passing the account. [314]

There never was a judge who has sat in this court, could be more disinclined than I am to allow a redemption, where there has been a length of time incurred since the possession of the mortgagee of the premisses in mortgage.

Especially in a case like the present, where a prowling assignee, as the plaintiff is, admits that for a very inconsiderable sum he

(1) *Aggas* v. *Pickerell*, *ante* 225.

bought

ANON.

bought the equity of redemption, imagining, from some knowledge of the law, he might be able to unravel a great number of circumstances, and by that means intitle himself to a redemption: and I should be very glad in decreeing a redemption, that I could do it for the sake of the unfortunate family who were the original borrowers of the money; but though they have conveyed away all their right, yet even in the case of an assignee of the equity of redemption, if there are circumstances which would induce the court to decree a redemption in favour of the representative of the mortgagor, the assignee who stands in his place will have the benefit of it.

I am of opinion, that though no single circumstance, abstracted from the rest, will be sufficient to intitle the plaintiff to a decree, yet, taking them altogether, they are of weight enough to entitle the plaintiff to a decree.

For in 1723 it was plainly a mortgage, and the bill was brought only in 1738, which is but *fifteen years*, and therefore is not within the bar which has of late years been laid down by the court.

There was a case before Sir *Joseph Jekyll*, where he decreed a redemption upon the circumstance of the person (who was in possession of an estate originally in mortgage) calling it by the name of *my mortgaged estate* in his will.

A redemption was decreed in this case, as the bill was brought after a possession of 15 years only, and therefore not within the bar.

But though I decree a redemption, it must be upon terms [illegible] be that the plaintiff before the Master in taking the account [illegible] confined to [illegible] and [illegible] only, and the interest upon the mortgage to be computed at 5 *l. per cent.* which his Lordship directed accordingly.

Case 115.

[315]

S. C. cited 2 Vef. 421, 424. Ante 284.

After the death of C. F. the testator, *Peter* one of his sons died, having first made his will, and his brother *Philip* executor and residuary legatee, who brought his bill against the other children of C. F. and insisted the share of *Peter* in the sum of 54,000 *l.* under the father's will absolutely vest[illegible] him, [illegible] his representative, or that it was fallen into the [illegible] the residuary [illegible] only. *It cannot belong to Peter's representatives, as it is [illegible] the yearly produce of the 54,000 l. that is given to [illegible] the children [illegible] as a provision for the [illegible] of each child, [illegible] divided from the residue, and therefore the share [illegible] ought [illegible] the surviving children.*

[illegible], *Easter Term*, 1[illegible]5

CLAUDIUS [illegible] by his will devised as follows: "I give and devise the sum of [illegible],000 *l.* to my executors, " [illegible] trustees [illegible] and jointly, in trust to invest the same, within the term of [illegible] months next after my " decease, in the purchase of such parliamentary funds, or " such other [illegible] securities as they, or the survivor of them, shall think fit, in trust to pay the yearly " [illegible] unto all my children by my " late [illegible] to those that shall be born by " my [illegible], when they shall have attained the age " of 21, [illegible]; and that the share of each of " my daughters be paid to each of my daughters during the " term of their natural lives. And I will that the interest or

" yearly

"yearly produce of the ſeveral ſums or parts of the ſaid ſecurities which ſhall belong to my daughters, who are or ſhall "be married, be paid to them upon their ſingle and ſeparate "receipts, without the controul or intermeddling of their "reſpective huſbands, and without their being ſubject to the "diſcharge of any of their ſaid huſband's debts. And I will "that ſuch my ſaid daughter or daughters' receipt ſingle and "ſeparate ſhall be a ſufficient diſcharge to my ſaid executors, "truſtees and guardians aforeſaid, for ſuch yearly intereſt and "produce: and after each and every of their reſpective de-"ceaſes, in truſt to divide to each the part or ſhare of the "ſecurities wherein the ſum ſhall have been inveſted, among "the iſſue of ſuch of my ſaid children who ſhall happen to "die, in ſuch manner and proportion as any of my ſaid "children ſo dying ſhall reſpectively appoint in and by his "or her laſt will and teſtament; and for want of ſuch ap-"pointment, then in truſt to divide ſuch part or ſhare of the "ſaid ſecurity equally among ſuch reſpective iſſue of any of "my ſaid children at their reſpective age or ages of 21 years, "and in truſt in the mean time to apply the intereſt of their "reſpective ſhare or portion towards their reſpective mainte-"nance and education: and in caſe any ſuch iſſue ſhall hap-"pen to deceaſe before attaining the age of 21 years, then "and in ſuch caſe I will that the ſhare of him or her or "them ſo dying do go to the ſurvivor or ſurvivors of them; "and in caſe all the iſſue of any of my children ſhall happen "to die before attaining the age of 21 years, to be divided "equally among all my other children or their children; "the children of any of my children who ſhall happen to be "dead at the time of the deceaſe of the longer liver of the "iſſue of my ſaid children (ſuch iſſue dying all before the "age of 21 years as aforeſaid) to have the ſhare of his or "her parent equally between them: And I will that my ſaid [316] "executors, truſtees and guardians do, until ſuch time as "they ſhall have inveſted the full ſum of 54,000*l.* in the "purchaſe of ſecurities for the purpoſes aforeſaid, pay to my "children out of the reſt and reſidue of my perſonal eſtate as "much as will, together with the intereſt of the ſecurities "which they ſhall purchaſe, as they go on in purchaſing "thereof, amount to 4*l.* for each hundred yearly, for their "reſpective part or ſhare of the yearly produce or intereſt of "ſaid 54,000*l.* I ſay of the ſaid 54,000*l.* beforeſaid, to re-"main and continue in truſtees aforeſaid; and I do hereby "declare, that I give and deviſe the ſaid 54,000*l.* to my "ſaid children by my former wife, and unto thoſe who ſhall "be born by my preſent wife *Anne* aforeſaid, over and above "the ſeveral ſums of money which I have given them, or "obliged myſelf to give them, either upon marriage, or any "otherwiſe, before the ſigning of this my preſent laſt will "and teſtament."

And the ſaid teſtator by the ſaid will, after payment of his debts, funerals and legacies, gave and deviſed the reſidue of his

Fonnereau v. Fonnereau.

his estate to his sons, *Thomas*, *Abell*, *Claudius*, *Peter* and *Philip*, to be equally divided between them, and made *Thomas*, *Abell*, *Peter* and *Philip*, executors, and died the 5th of *April*, 1740.

The 15th of *October*, 1743, *Peter* died, having made his will, and *Philip* executor thereof, and residuary legatee, who brought his bill against the other children of the said *Claude Fonnereau*, and insisted that the share of *Peter* in the said 54,000 *l.* amounting to 6000 *l.* was absolutely vested in *Peter*, and so belonged to him as his representative; if not so, yet the testator not having made any provision for the contingency of any of his children dying without any issue, the share of such child so dying fell into the *residuum* of the testator's estate, and belonged to the residuary legatees exclusive of the other children.

The daughters by their answers insisted, that though the contingency of a child's dying without issue was not in words provided for, yet it was virtually included in the more remote contingency provided for by the will, (*viz*) *the issue of any of the children dying before 21 without issue*, and that it might, according to the limitation over in that case, be divided among all the children equally.

The cases cited for the plaintiff were *Eastcourt* versus *Warry*, *Comberb.* 437. *Newland* versus *Shepherd*, 2 *P. Wms.* 194. which Lord *Hardwicke* said, he could see no reason to approve of as

[317] reported there. 2 *Ventr.* 363. *Hutton* versus *Simpson.* 3 *Vern.* 722. *Harris* versus *Chaplin*, the 25th of *February* 1735, *Cro. Eliz.* 525. *

For the defendants was cited the case of *Jones* versus *Westcombe*, *Mich. term* 1711. *Eq. Cas. Abr.* 245.

Lord Chancellor,

There are three questions in this case.

The first is, if this share belongs to *Philip*, *Peter*'s representative.

Secondly, if it goes to all the surviving children.

Thirdly, If it falls into the general *residuum* of the testator's estate.

As to *the first*, I am very clear it cannot belong to *Peter*'s representative, because it never vested in *Peter* himself; for nothing is given to any of the children but the share of the yearly produce and interest of the principal sum of 54,000*l* which is intended as a provision for the several *stirpes* of each child.

As to the second question, I am of opinion it will go according to the devise over, and that it must be according to the intent of the testator collected from the several parts of the will.

* *J. S.* after the devise of several parts of his real and personal estates to several persons, devises the interest and produce of the surplus of his real and personal estate to his grandchildren, until their age of 21. *This will pass the absolute right and property of the real and personal estate to the grandchildren after age.* *Newland* versus *Shephard*, 2 *P. Wms.* 194.

N. B *Lord* Hardwicke *said, he could see no reason to approve of this determination as reported there.*

Consider

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Consider it with regard to the contingency, and as to what distinguishes it from the case of *Jones* versus *Westcombe*: It is insisted by the plaintiff that the contingency must happen of a child being born, and that child dying without issue before the age of 21, or the devise over of the share to the other children cannot take effect.

Where there are remainders of a real estate, if the person to whom the particular limitation is, never has been *in esse*, the remainder over takes effect.

In the case of a real estate, such a construction could not be made, because where there are remainders it has been considered as a disposition of the reversion left in the testator, and if the person to whom the particular limitation is, never has been *in esse*, the remainder over takes effect (1).

It was said the disposition of personal things differ, because they cannot be disposed of by way of remainder, and are executory, which must take effect strictly according to the contingency upon which they are limited. [318]

Jones versus *Westcomb* is an authority directly contrary, according to Lord *Harcourt's* opinion; and of that opinion were the court of King's Bench: The ejectment there was for the freehold, and will not determine the judgment of this court with regard to personal estate. I am of Lord *Harcourt's* opinion upon the reason of the thing: People frequently differ in expression, though they mean the same thing; and it would be construing wills by too great a nicety, to lay weight upon such strict forms of words, when the meaning is plain: I never knew a case where this court has departed from such a latitude of construction, as the courts at law would have made upon a limitation of a freehold estate, in order to defeat a bequest over, though it has frequently done so to support a devise over.

There may be a difference in expression in wills, though the same thing is meant, and to lay weight on strict forms of words, when the meaning is plain, would be construing wills with too great nicety.

(1) In *Avelyn* v. *Ward*, 1 *Ves.* 422. Lord *Hardwicke* said, he knew of no case of a remainder or conditional limitation over of a real estate, whether the first limitation were by way of a particular estate, so as to leave a proper remainder, or the conditional subsequent limitation were to defeat an absolute fee before limited, but if the precedent limitation, *by what means so ever be out of the case*, the subsequent limitation should take place. See also *Scatterwood* v. *Edge*, 1 *Salk* 229. *Jones* v *Westcomb*, 1 *Eq Ab* 245. *Hopkins* v. *Hopkins*, *Ca. Temp. Talb.* 44. *Andrews* v *Fulham*, 2 *Stra.* 1092. 1 *Ves.* 421. *S C.* 1 *Wils.* 107. *S. C.* 3 *Burr.* 1624. *S. C. Gulliver* v. *Wickett*, 1 *Wils.* 105. 2 *Stra.* 1093. *Hayward* v. *Stillingfleet*, *ante* 1 vol. 422. *Avelyn* v. *Ward*, 1 *Ves.* 420. *Bradford* v *Foley*, *Dougl* 63. *Statham* v. *Bell*, *Cowp* 40 *Horton* v *Whittaker*, 1 *Term Rep.* 346. But where there is a devise of a particular estate with a limitation over upon a contingency, which is to determine the particular estate sooner than it otherwise would determine, there if the preceding particular estate *actually takes place*, and the condition is not performed, the remainder will *not* take effect upon the expiration of such particular estate. *Amhurst* v. *Litton*, *ante* 286. 8 *Vin.* 221. *pl.* 2.. *S. C.* 3 *Bro. Par. Ca.* 486 *S. C. Sheffield* v. Lord *Orrery*, *ante* 282, 285. *Sed vide* *Brown* v. *Cutter*, *Raym.* 427 3 *Lev.* 125.

This

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This brings it to the intent of the testator, and there is no doubt of that, for there can be no reason for a devise over in case of the issue of a child dying, and not in the case of a child itself dying without any issue at all.

The case of *Estcourt* versus *Warry* in *Comberbach*, is reported in a book that is very incorrect, and of a very different contingency, and can be no authority in the present case.

As to the third question, if it falls into the general *residuum*, there are some circumstances here which makes it a stronger case than *Jones* versus *Westcomb*; for I think here appears an intent that it should go over absolutely, from the introductory clause of the testator's will: It is plain he intended to dispose of his whole estate; it is plain this was a fund detached and divided from the general residue of his estate: And the introductory words of the residuary clause are, after payment of all debts, &c. and legacies, I give the residue; this is a particular legacy, and divided from what he intended to be the residue: And I am of opinion the share of *Peter* ought to go among the surviving children (1).

(1) "In equal shares." *Reg. Lib. A.* 1744. fol. 418. In *Sheffield* v. Lord *Orrery*, *ante* 284. Lord *Hardwicke* observes, that in the case of *Fonnereau* v. *Fonnereau*, "the penning of the will was "so very particular, that no precedent "can be drawn from thence."

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S. C. cited, 1 Vef. 45.

The legacies under the will of *J. C.* are vested ones, and the time of payment postponed merely on *circumstances* arising from conveniency to the *estate*, and therefore the court decreed them to the plaintiff (1).

Sherman versus *Collins*, *February* 4, 1745.

JOHN COLLINS by will, dated the 16th of *October* 1733, "gives and bequeathes unto each of his daughters "*Ann* and *Mary Collins*, three hundred pounds, to be paid to "them by his executor *John Collins*, when he shall attain his "age of twenty-six; *but in regard my two daughters are already* "*provided for by lands settled on them by me, and my late wife, and* "*by legacies left them by their grandfather, and which I have paid* "*unto them; it is my intention that they shall not be intitled to any* "*interest for the said sums to them given by me as aforesaid, be-* "*fore the same shall become payable as aforesaid*; however, for the "better securing the said several sums of three hundred pounds "given to my two daughters, my will is, that my two closes in "*Sutton* shall stand respectively charged with my personal estate,

(1) So *Butler* v. *Duncombe*, 1 *P. W.* 457. *Pitfield's* case, 2 *P. W.* 513. *Hutchins* v. *Foy*, *Com. Rep.* 716. *Lowther* v. *Condon*, *ante* 2 vol. 127, 130 *Emes* v. *Hancock*, *ib.* 507. *Barn. Cha. Rep.* 327. *S. C. Attorney General* v. *Milner*, *ante* 114. *Hodgson* v. *Rawson*, 1 *Vef.* 44. *Jeal* v. *Tichener*, *Amb.* 703. 1 *Bro. Cha. Rep.* 120. *S. C. Tunstall* v. *Bracken*, *Amb.* 167. 1 *Bro. Cha. Rep.* 124. *S. C. Dawson* v. *Killet*, 1 *Bro. Cha. Rep.* 119. *Clarke* v. *Ross*, 1 *Bro. Cha. Rep.* 120 note. *Kemp* v. *Davy*, *ibid.* note. *Godwin* v. *Munday*, 1 *Bro. Cha. Rep.* 191. *Pawsey* v. *Edgar*, *ibid.* 192, note. *Thomson* v. *Dow*, *ibid.* 193, note. *Morgan* v. *Gardiner*, *ibid.* note.

"and

"*and be liable to the payment of the said several sums of three hundred* SHEIMAN v. COLLINS.
"*pounds to my two daughters at the time above mentioned, with a*
"*power to enter and hold till payment of principal and interest, from*
"*the time it shall become due*, and after payment thereof, devises
"the premisses to his son *John Collins* in fee, whom he makes ex-
"ecutor and residuary legatee."

Both the daughters arrived at their age of twenty-one, but died before *John Collins* attained his age of twenty-six; one of them married, and left two children, the other is dead unmarried, but by will gave the three hundred pounds to her sister.

The husband, and the two children, bring the bill for the legacies.

Mr. *Brown*, for the plaintiffs, cited *Powlet* versus *Dogget*, 2 *Vern.* 86. *Miller* versus *Warren*, *id.* 207. *Jackson* versus *Farrand*, *id.* 424. *Bruen* versus *Bruen*, 2 *Vern.* 439. *Pitfield's case*, 2 *Will.* 513. and *Lowther* versus *Condon*, before Lord *Hardwicke*, the first of *June*, 1741 (1).

It appeared that the personal estate was not sufficient.

Mr. *Clark*, of the same side, cited *Hall* versus *Terry*, *M. T.* 1738, 1 *T. Atk.* 502. and *King* versus *Withers*, *Cas. in the time of Lord Talbot* 117. and *Buckley* versus *Stanlake*, the 4th of *November* 1719.

Mr. *Robinson*, of the same side, cited *Hutchins* versus *Fitzwater and Foy*, L. C. B. *Comm.* 716.

Mr. Solicitor General, for the defendant, the executor, cited *Bradley* versus *Powell*, *Cas. in the time of Lord Talbot*, 193, and *Hall* versus *Terry*, 1 *Tr. Atk.* 502. to shew that the general rule shall prevail if the legatee dies before the contingency happens. [320]

Mr. *Erskin*, of the same side, cited *Swinbourn's 4th part*, 317. and *Bright* versus *Norton*, *before Lord Talbot*, a similar point with *Bradley* versus *Powell*, and *Tourney* versus *Tourney*, *Preced. in Chanc.* 290.

LORD CHANCELLOR,

This is a legacy in the first place on personal estate, and if deficient, a right of entry is given upon *real* estate, and to hold till satisfied.

The reasons I shall go upon are partly reasons founded on the rules of this court.

First, That this is a legacy given to two daughters generally, *to be paid when his son* John Collins *shall attain his age of twenty-six*.

With regard to the personal estate, it is not disputed at the bar, but the plaintiffs are entitled; it is true, it has been determined; where there is a mixed fund of real and personal, that notwithstanding it is considered as a vested legacy as to the personal

Where it is a mixed fund of real and personal, though considered as a vested legacy in respect to the latter, yet it shall not be raised out of the former, where the legatee dies before the time of payment (2).

(1) *Ante*, 2 vol. 127, 130 *S. C.*

(2) See *Prowse* v. *Abington*, *ante*, 1 vol. 482. note 1. *Hall* v. *Terry*, *ante* 1 vol. 502. *Van* v. *Clarke ante* 1 vol. 512. *Boycot* v. *Cotton*, *ante* 1 vol. 555. *Richardson* v. *Greese ante* 69. *Attorney General* v. *Milner*, *ante* 112.

estate,

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estate, yet otherwise as to the auxiliary fund, and shall not be raised out of the real estate, where legatee dies before the time of payment.

Even this was a case of pretty hard digestion when *first* determined, because, if the duty itself was due, where the land was given as a security, it seemed a little harsh, that the land should not be commensurate to the security.

This determination was thought a hard one at the time, but has prevailed ever since, to prevent unnecessary burdens being brought upon heirs.

But to prevent bringing unnecessary burthens upon heirs, the court was prevailed upon to determine it so, and it is now settled that it should follow the rule of portions and legacies chargeable on real estate, and sink in the land.

Which brings it to the question, what would be the consequence if these legacies had been originally chargeable on real estate.

" *But in regard my two daughters are already provided for by* " *lands settled*, &c."

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Where a legacy or portion is to be paid at a certain age, or time, if the legatee die before that age, or time, it shall sink into the land.

It is true, the general rule is, that where a legacy or portion is to be paid at a certain age, or certain time, if the legatee die before that age, or before the time of payment comes, it shall sink into the land, and has been so established ever since the case of *Powlet* versus *Powlet*, 2 *Ventr.* 306, 307. and 1 *Vern.* 321.

Originally determined on portions, afterwards extended to legacies, and taken from circumstances regarding legatee's age, or day of marriage.

It was determined originally upon portions, afterwards was extended to legacies, and taken from circumstances regarding legatee's age, or day of marriage, the court concluding that parents thought if their children did not live till such time, that they would not want their portions or legacies.

The rule not adhered to, where the circumstances are taken from the conveniency of the estate, and not the legatee's person.

But it cannot be said it holds equally strong where the circumstances are taken from the conveniency of the estate, and not from the person of the legatee.

Determined first by Lord *Talbot* in the case of *King* versus *Withers*, that the legacy, though charged upon land, should be raised, the time of payment being postponed only for the conveniency of the estate.

King versus *Withers*, *before Lord Talbot*, was the first case where a legacy was determined to be vested, though charged upon land, on *circumstances arising from conveniency to the estate*; for his Lordship was of opinion there the legacy should be raised, the time of payment being postponed *for the conveniency of the estate*; and though Lord *Talbot* took notice of this distinction, in *Bradley* versus *Powell*, which came before him after *King* and *Withers*, yet there was a material difference, for the person died before the time appointed for payment came, and therefore he determined the portion to sink; the strong reasoning in *King* versus *Withers*, was, that the testator intended, upon the event of the son's dying, to increase his daughter's provision, and her family.

If this be the general doctrine, consider how it stands here: the time of payment was most manifestly postponed, in order to prevent the burthen of interest falling upon the estate of the son till he attained his age of twenty-six; and when he has given this express reason, to infer from thence that the daughter should lose the principal, or her representatives, would be a very forced construction.

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If the son had died before twenty-six, the daughters would not have been intitled to their legacies, as the contingency had not happened.

A dying before the contingency happens, is the reason why a legacy that is charged upon land should not be payable, and I do not see, if the son had died before his age of twenty-six, how the daughters could have been intitled.

* In the case of *Lowther* versus *Condon*, the strong reason which weighed with me was, that the portion was directed to be raised after the death of the testator's wife, and therefore postponed merely from the conveniency to the estate and family, and not intended that the daughters should lose their portions because they died before the mother; and there are a great many cases where this court has held it shall not be raised in the mother's life-time.

Where the portion is directed to be raised after the death of the mother, there are many cases where this court has held it shall not be raised in her life-time.

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Therefore, if considered singly upon the general rules of the court, the legacy would be vested, and transmissible

I do not rest it here, but am of opinion, on general rules of law, it is a vested legacy, for the plaintiff might have had a legal remedy by ejectment: The words are, *with a power to enter and hold till payment*, &c. *Vide the will.*

This I take to be a right of entry given them to hold the land in the nature of a tenancy by *elegit*, and rightly said at the bar, to be a chattel interest (1).

It has been improperly called a power, for it is a right of entry, which differs from a power; for a right of entry will go to executors and administrators; for if a chattel interest be granted to a man, though his executors are not named, yet they will take it barely as his representatives.

A right of entry differs from a power, for it will go to executors and administrators.

If this be so, then there is a legal remedy to enter, and hold the lands till principal and interest be satisfied.

Now, can it be said, where plaintiff shall have a satisfaction in his own person at law, yet that I should relieve against it in this court, merely upon a will, and where all persons are volunteers?

The cases have, for the most part, arisen upon equitable charges, where there is no remedy except in this court, and in the cases of trusts, as it can only be determined here, whether the trust has arisen or not.

(1) So *Wigg* v. *Wigg*, *ante* 1 vol. 382. *Emes* v. *Hancock*, *ante* 2 vol. 508, 509.

This

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This is not an *equitable* charge, but a *legal* one (1), and differs from those cases; so that the party having his remedy at law, by ejectment, there are no grounds for this court to take it from him.

But the plaintiff comes here properly to have an account of the personal estate of the testator, in the first place, and likewise to avoid circuity; for if the plaintiff had recovered at law, then the defendant would have had a right to be relieved here, upon payment of principal and interest.

His Lordship decreed the legacies to the plaintiff (2).

(1) And this seems to be the principle, which has guided in the determination of many of the cases. *Ives* v. *Hancock*, ante 2 vol. 507, 509. *Tunstal* v. *Brachen*, *Amb.* 167, 170. 1 *Bro. Cha. Rep.* 124 S. C. *Fenbrey* v. *Martin*, *Amb.* 230. *Manning* v. *Hubert*, *Amb.* 575. *Jake* v. *Titchmarsh*, *Amb.* 703. *Hutchins* v *Foy*, *Com.* 716. *Hodgson* v. *Rawson*, 1 *Ves.* 47 *Pawlet* v *Ivor*, 1 *Bro. Cha. Rep.* 192, note *Goodwin* v. *Munday*, 1 *Bro. Cha Rep.* 191.

(2) *Reg. Lib. B.* 1745. fol 277.

Case 117. [323]

Sarah Deacon, March 26, 1746, *Executrix of the Will of Joseph Smith deceased, Son and Heir of Joseph Smith his late Father deceased, by Martha, his first Wife,* } Plaintiff.

Eleanor Smith, Widow of Joseph Smith, the Father, and five of his Children, } Defendants.

S. C. cited, 1 Ves. 540.
J. S. covenants to convey and settle houses, lands and tenements or a rent-charge issuing thereout to certain uses. J. S. afterwards purchases lands, but does not make any settlement of them pursuant to the articles and covenant, and then dies. These after-purchased lands shall be to the uses of the settlement (1).

IN *Easter* term, 1717 *Joseph Smith*, the younger, brought his bill against *Eleanor Smith*, the widow and administratrix of *Joseph Smith* the father, and the other defendants, his children by *Eleanor*, for an account and distribution of the father's personal estate, and for a discovery of the real estate which he was seised of at his death, and all mortgages, &c. and for an account of rents, and to be let into possession.

The defendant *Eleanor*, in her answer to that bill, set forth, that by deed-poll, or articles of agreement, dated the 28th of *July*, 1716, between *Joseph Smith*, the father of the plaintiff, of the one part, and *Francis Kidgell*, the defendant's father, of the other, *Smith* covenanted for him, his heirs, executors and administrators, with the said *Kidgell*, &c. that in consideration of a portion of four hundred pounds, the said *Smith should and would convey and settle houses, lands and tenements, or a rent-charge*

(1) So *Tooke* v. *Hastings*, 2 *Vern.* 97. *Roundel* v *Currer*, ibid 482. *Wilcocks* v. *Wilcocks*, ibid. 558 *Lechmere* v. *Carlisle*, 3 *P. W.* 211. 228. *Wilks* v. *Wilks*, 5 *Vin.* 293. *Bridges* v. *Bere*, 2 *Eq. Ab.* 34. *Lewis* v. *Hill*, 1 *Ves.* 274. *Attorney General* v. *Whorwood*, 1 *Ves.* 540 *Sowden* v. *Sowden*, 1 *Bro. Cha. Rep.* 582.

issuing

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issuing thereout, of the yearly value of forty pounds, on trustees, to the use of himself for life, and afterwards to Eleanor *for life, in bar of dower, remainder to the heirs of* Joseph Smith *on the body of* Eleanor, subject to a power to charge the estate of forty pounds *per ann.* with three hundred pounds as a provision for the younger children of the marriage.

Joseph Smith, the elder, at the time of his marriage with the defendant *Eleanor*, was not seised of any real estate, whereof he could make a settlement pursuant to the articles, but afterwards purchased a freehold called *Cheesman's* in *East Ilsley* in *Berkshire*, of the yearly value of nine pounds, and a freehold messuage at *West Ilsley*, of the yearly value of forty pounds, subject to an estate for life of *Mary Smith*, widow, in an undivided moiety thereof; before the last purchase the same estate had been mortgaged for 1000 years term, to *Joseph Smith* the elder, for securing two hundred and fifty pounds and interest.

The defendant, *Eleanor*, insisted, that her husband purchased the same, or so much as was in possession, in order to enable him to perform the articles.

[324] Soon after *Joseph Smith* the father's purchase of the estate at *West Ilsley*, he assigned over the mortgage to a person, without the defendant's joining with him, for the remainder of the term of 1000 years, for securing two hundred and fifty pounds, and interest, to that person.

The defendant *Eleanor*, soon after her husband's death, obtained letters of administration, and with his personal estate paid off the two hundred and fifty pounds, and interest, to the mortgagee, who assigned the term to one *Stevens*, in trust for such person as should be intitled to the freehold and inheritance.

She entered too upon *Cheesman's* estate, and received the profits, and she and her eldest son, by their answer, insist the marriage articles should be carried into execution, and that a settlement be made of the real estates whereof *Joseph Smith* died seised, and in case they should not be sufficient, then other lands to be purchased out of the personal estate, sufficient to make up a freehold estate of the clear yearly value of forty pounds, and settled, pursuant to the articles, to the use of the defendant *Eleanor*, for life, with remainder to *Thomas*, and the heirs of his body, as being the eldest son of the marriage.

The plaintiff insisted, that his father purchased these freehold estates, with an intent that the plaintiff should inherit them, and that the defendant's marriage agreement, if insisted on, ought to be made good out of the personal estate.

The evidence for the defendant was, that *Joseph Smith*, the father, said, he purchased the estate called *Cheesman's*, with an intent to build a house on part, and that the defendant and his wife should live there after his death.

The cause being heard before the Master of the *Rolls*, the 25th of *June*, 1743, his Honor declared, that *Cheesman's* estate in *East Ilsley*, and so much of the *West Ilsley* estate as was in possession at the time of *Joseph Smith's* purchase, being an undivided moiety, ought to be considered as purchased in part performance of the covenant in the marriage articles, for making a jointure of

Deacon v. Smith.

forty pounds *per annum* on *Eleanor*, and a provision for the issue of the marriage, and should be so settled; and that the other moiety of the *West Ilsley* estate, not being in possession at the time of the purchase, was not to be considered as purchased in pursuance of the articles, but belonging to the plaintiff, as heir at law, and decreed accordingly; and if the *Cheeseman's* estate, and the moiety of the *West Ilsley* estates, were deficient to make good the covenant in the articles, the same to be answered out of the intestate's personal estate (1)

[325] Before any further proceedings, the plaintiff *Smith* died, but by his will had devised to *Sarah Deacon*, her heirs, executors and administrators, all his real and personal estate, and appointed her sole executrix, by virtue whereof she became intitled to the benefit of the said suit, and stands in the place of *Joseph Smith* the younger, with respect to his title and interest in the real and personal estates of his late father.

Sarah Deacon, in *Hilary* term 1743, brought her bill of revivor, and the proceedings were ordered to stand revived.

The defendants, soon after the hearing of the original cause, procured the decree to be signed and inrolled, and thereby prevented any re-hearing, or appeal against the said decree, which the present plaintiff insists is erroneous, and hath therefore exhibited her bill of review, to shew the decree is erroneous in the following particulars, *for that the estates called* Cheeseman's, *and so much of the* West Ilsley *estate in possession at the time of the purchase, did belong and ought to have been decreed to the plaintiff* Joseph Smith, *as heir at law to his father.*

That it ought to have been decreed likewise, that the rents and profits of such estates should have been paid to the plaintiff, and the deeds delivered up to him, and the defendant Eleanor *to procure the mortgage term to be assigned to the plaintiff.*

That it ought to have been decreed likewise, that the personal estate of Joseph Smith *the father, should be applied to make good the whole arrears of forty pounds* per ann. *from the time of his death, and in the purchase of houses, lands and tenements of* 40 l. per ann. *to be settled to the uses in the articles.*

She therefore prays, that for these defects in the decree, it may be reversed.

Lord Chancellor took some time to consider, and this day gave judgment.

The plaintiff's counsel have relied upon two objections.

First, That here no sufficient act appears to be done by *Joseph Smith* the elder, and covenantor, to affect or subject these lands to the articles.

Secondly, That it might be prejudicial to purchasers and creditors, to construe these lands to be liable to the articles.

[326] As to the first, I am of opinion, that there are not sufficient reasons to determine that these lands are not bound by the articles.

(1) *Reg. Lib. B.* 1742. fol. 551.

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In all these cases, the court have gone upon the intention of parties, and have not required that strictness as in the statute of frauds and perjuries; and many cases have gone so far, as to rely upon a strong presumption merely without any positive evidence. DEACON v SMITH.

What has governed the court is, that a man can be no contractor with his heir or executor, for they all derive under his will or permission; therefore, that the intention should be the rule, and turn the balance.

The case of *Lechmere* versus *Lechmere* (1). the 13th of *May* 1735. I mention for the sake of the general ground, for there Sir *Joseph Jekyll* laid it down, the intention ought to be the rule, agreeable to the judgment of three successive Chancellors, Lord *Somers*, Lord *Cowper*, and Lord *Harcourt*.

Lord *Talbot*, on the rehearing, laid down the same rule, and said, "the cases upon satisfaction are generally between debtor "and creditor; and the heir is no creditor, but only stands in "his ancestor's place: one rule of satisfaction is, that it de-"pends upon the intent of the party, and that which way soever "the intent is, that way it must be taken; but this is to be un-"derstood with some restriction, as that the thing intended for "a satisfaction be of the same kind, or a greater thing, in satis-"faction of a less; for if otherwise, this court will compel a "man to be just before he is generous, and so will decree "both:" But these questions, he said, are no ways material in this case, *which turns entirely upon Lord* Lechmere's *intent at the time of the purchases made. Cas. in Chan. in Lord Talbot's time*, 92.

In the cases of satisfaction, one rule is, that it depends on the intent of the party, and which way soever the intent is, that way it must be taken.

I cite it, to shew, that both the Master of the *Rolls*, and Lord *Talbot*, who differed in opinion as to the point only of the fee-simple lands, purchased since the covenant, laid down the same general rule as to the intention.

Therefore, I am of opinion, it is not material in this case, to require particular acts to be done; but if there is a sufficient presumption, it was the intention of *Joseph Smith* the elder, it should go according to the articles, *the land is bound by the articles*.

The second objection was, that it might be prejudicial to purchasers and creditors to construe these lands to be liable to the articles.

I think no purchaser, or mortgagee who is a purchaser *pro tanto*, will be affected; for if the husband had sold them or mortgaged them, it would have been evidence of a different intention, and would therefore have taken off all evidence of his intention to bind them by the articles. [327]

It is said the creditors by specialty would be affected by it: I lay no weight on this, for the wife and the issue of the marriage are creditors by specialty themselves, and it is in the power of the owner of the estate to prefer one specialty creditor to another, for none of them have any specifick lien upon the lands.

It is in the power of the owner of the estate to prefer one specialty creditor to another, for none of them have any specifick lien upon the lands.

(1) 3 *P. W.* 211. *S. C.*

In

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In the case of *Roundell* versus *Breary*, 2 *Vern.* 482. the court were of opinion that the articles were a lien on the lands whereof the father was then seised, though no particular lands were mentioned in the articles.

Now the objection held equally strong there with regard to creditors by specialty; and therefore, as to this part of the present case, the intention of the husband ought here to prevail, if it appears by presumption, he meant the estate *should be bound by the articles*.

But another objection has been taken, that admitting there was such an intention, yet there is no sufficient evidence of such intion.

First, from the nature of the articles themselves.

Two things were relied on to shew, that no intention could from the nature of the articles appear.

Because that there are articles *to convey and settle lands*, and not to purchase.

Secondly, that here is an option to settle lands of 40 *l. per ann.* or a rent-charge out of the lands.

As to the first, I am of opinion it is much too slight a difference in the present case to distinguish it from *Lechmere* versus *Lechmere*.

Every case of this kind must be taken according to it's own circumstances.

Joseph Smith the elder, when he entered into these articles, had no estate in land at all, and consequently he must purchase lands before he could settle them: And amounts to the same thing as if the articles had been *to purchase* and settle.

[328] It has been truly said, he might have done it out of lands purchased, or lands descended to him, for he was master of both.

The first act to be done, was to acquire them, and then he was to convey and settle; this is too slight therefore to take it out of the case of *Lechmere* and *Lechmere*.

As to the second thing, that here is an option to settle lands of 40 *l. per ann.* or a rent-charge out of the lands.

Joseph Smith has made no such settlement, and I cannot presume that he has made the option of that part of the disjunctive of settling a rent-charge: For as he was a debtor and covenantor, the presumption lies that he would settle in such manner as would be the least burdensome to himself.

There is evidence in the cause, to shew, that his intention was to settle the lands, and not *a rent charge*, for that he was heard to say, that he intended to build a house on the *Cheeseman* estate for his wife to live in, provided she survived him.

I must presume him just before he was generous, and that his meaning was to do what he covenanted before he gave her any thing.

The objections have been carried still further from the nature of the purchases themselves; that the purchases were made by driblets and small parcels.

That was an objection which was made in *Lechmere* versus *Lechmere*, and over-ruled by the court.

As

As to the *Cheeseman estate*, it is not pretended but that was a proper purchase to be settled in part satisfaction of the articles.

As to the *West Illsley* estate, it was said that one moiety being in reversion would descend to his son, and the other could only be affected by the articles.

Though the money was in reversion, yet there was but one life upon it, and therefore it might still be his intention it should be bound when it fell in.

Another objection has been taken from the mortgage, that it was antecedent to his purchase, and assigned over to another person for a valuable consideration.

It was only continuing in effect the same mortgage upon the estate, because he wanted to take up money to complete the purchase.

In *Lechmere* versus *Lechmere* the purchase was agreed to be made within one year after the marriage, but not made till long after, and the covenant being broken, there could not be said to be a performance of it. [329]

Here, this gentleman had his whole life to perform it in: And if Lord *Lechmere's* purchase had been made within the year, it would have been stronger.

The strong reason in that case was, that the Lady's trustees had no notice, nor the least pretence that they were advised with about it.

In the present, there is nothing in my opinion arising from the nature of the articles to take off from the presumption of the husband's intention, that the land *should be bound by them*; and the evidence likewise in this case, of his intention she should enjoy them for life, is an additional fact more, than in *Lechmere* versus *Lechmere*.

The case of *Took* versus *Hastings*, 2 *Vern*. 97. is a saying only of the court, and *dictums* in reports are not greatly to be relied on, without the state of the case, and therefore I sent to the register for the decree which was made in 1688.

Dictums in reports are not greatly to be relied on without the state of the case.

It does not appear by the book, whether the estate of *Backwell* was purchased before or after the bond to settle land; if after, to be sure a very strong case.

The other case relied upon was *Roundell* versus *Breary*, 2 *Vern*. 482.

The difference between the two cases is this;

That here it is, to convey and settle lands.

The covenant there was only to settle lands of 150 *l. per ann.* and therefore not so strong as as the present.

A covenant to convey and settle lands, is stronger than to settle only.

These were the particular cases relied upon.

For these reasons, and the authority of these cases, I am of opinion, it would be too hard to reverse the decree, and besides extremely convenient for families that it should be so determined.

The party who is to purchase cannot buy the whole at once, but by parcels.

And

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Though the party who is under a covenant to purchase and settle lands dies before he has completed it, that is no reason why it should descend upon the heir at law, and therefore the Master of the Rolls did right, in determining upon what appears to be the intention, or presumptive evidence of that intention, and the decree affirmed.

And because he happens to be cut off by death, before it is compleated, to say, for this reason, that it should descend upon the heir at law, would make great confusion in families; and therefore the *Master of the Rolls* has done extremely right in determining upon what appears to be the intention on presumptive evidence of that intention; and consequently I do affirm the decree (1).

(1) *Reg. Lib.* A 1745, fol. 608.

Case 118. *Reynish* versus *Martin*, *May* 5, 1746.

3 Wils. 130, S. C. A mother by her will says, that if her daughter marry with the consent of trustees, or the major part of them, and signified in writing, before such marriage had, then I give to her, and not otherwise, 800*l.* and directed *M.* to pay her 30*l.* yearly whilst she continued sole, by 15*l.* each *May* day, and *All Saints* day, and charged all her real estate with debts of all kinds and legacies.

The daughter after the death of the mother married the plaintiff without the consent of the trustees, and died soon after, but before her death the trustees declared their consent and approbation in writing. *Lord chancellor directed the plaintiff should be paid the arrears of the 30l. pro rata till the marriage, and in case the personal estate should be exhausted by payment of debts, so much of the real estate to be sold as will pay the 800l. and arrears of the annuity* (1).

ELIZABETH *Philips*, by her will the 26th of *October*, 1734, gave and devised unto *Martha Philips* her eldest daughter, all her real estate, to have and to hold to her and her heirs for ever, subject to such charges as shall be therein after expressed.

Then follows the clause upon which the present question arose.

"Provided always, and it is my will, if my daughter *Mary* marry by and with the consent of the trustees (therein particularly named) or the major part of them, and signified in writing before such marriage had, then, and not otherwise, I give and devise unto my said daughter *Mary* the sum of eight hundred pounds, and it is my will that my said daughter *Martha* shall pay unto my said daughter *Mary* the sum of 30*l.* yearly during the said *Mary*'s continuing sole and unmarried, by fifteen pounds each *May* day, and *All Saints* day, also I do hereby charge all my aforesaid real estate with all my debts of all kind, and with all my legacies."

The testatrix died leaving issue two daughters *Martha* and *Mary*, *Mary* married *Thomas Reynish* the plaintiff, without the consent of the trustees, and died soon afterwards, but before her death, the trustees declared their consent and approbation in writing.

This bill was brought by *Thomas Reynish*, as the representative and administrator of *Mary* his wife, for an account of the personal estate, and that the same might be applied in payment of the said legacy of eight hundred pounds, and so much of the arrears of the annuity of 30*l.* *per ann.* as were due to *Mary* be-

(1) See *Harvey* v. *Aston*, *ante*, 1 vol. 361, and the note at the end of that case.

fore

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fore her marriage; but in case the personal estate should not be sufficient, that then the real estate, or so much thereof as will make good the deficiency, &c. might be sold, and the money arising therefrom applied for that purpose.

This case coming on to be heard at the *Rolls*, the personal estate not being sufficient, his Honor decreed *the real estate* to be sold for payment of the legacy and arrears of the annuity.

The defendants appealed from this decree, and the cause now standing for judgment, *Lord Chancellor* delivered his opinion to this effect.

As *Mary* married without the consent of the trustees, their consent or approbation afterwards was immaterial, and therefore was not insisted upon by the plaintiff's counsel, because no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it. (1).

The consent of the trustees after the marriage immaterial, for no subsequent approbation could amount to a performance of the condition, or dispense with a breach of it.

The general question therefore will be, whether under the circumstances of this case the plaintiff as administrator of *Mary* his wife is entitled to this legacy of eight hundred pounds.

This depends on three considerations:

First, What the event would be, if this legacy of eight hundred pounds is considered merely as a personal legacy to be paid out of the personal estate only.

Secondly, If considered as a charge originally laid upon the lands.

Thirdly, Supposing this legacy to be merely personal, what remedy the plaintiff has in this court, or in what manner the same ought to be raised.

As to *the first*, I apprehend that taking this as a mere personal legacy, the plaintiff by the rules of the civil and ecclesiastical law, and which have been constantly adhered to in this court, will be intitled to the legacy; for it is an established rule in the civil law, and has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent, that this is not looked on as a condition annext to the legacy, but as a declaration of the testator *in terrorem*.

It has long been the doctrine of this court, that where a personal legacy is given to a child on condition of marrying with consent that this is not a condition annexed to the legacy, but a declaration of the testator *in terrorem* only.

* This rule is so strictly adhered to in the ecclesiastical court, that the marrying without consent is not considered there as a breach of the condition, *although the legacy is actually given over*; but that rule has not been carried so far in this court, for in many instances here it has been considered as a breach of the condition, and the legacy thereby forfeited; but that differs from the present case, because here the legacy is given to *Mary* only, *without any limitation over*.

The marrying without consent is not considered in the ecclesiastical court as a breach of the condition though the legacy is actually given over, but that rule has not been carried so far in this court.

[*332]

(1) *Ante* 2 vol 617. But see *Burleton* v. *Humphreys*, 4 *Burr* 2056. *Amb.* 256. S. C. *Mercer* v. *Hall*, 4 *Bro. Cha Rep.* 318. *Farmer* v. *Compton*, 1 *Cha. Rep.* 1.

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But then it was objected, that there is a strong and material difference between a *condition precedent* and subsequent, and this being *a condition precedent*, and as the condition was not performed nothing vested, because the event was not come, on which the legacy was to take effect.

Neither the civil or ecclesiastical law make any distinction between conditions precedent or subsequent, but in both cases the condition is void.

Undoubtedly this is true in general both in law and equity; but I do not find that the civil or ecclesiastical law have made any distinction between conditions precedent and subsequent, but that in both cases the condition as such is merely void (1).

This rule of the ecclesiastical court was strongly relied on in the case of *Harvey* and *Aston*, (1 *T. Atk.* 361.) but it was the opinion of all the Judges who assisted in that case, that it was not to be carried so far in this court; and the distinction taken by Lord Chief Baron *Comyns* in his argument in that case is extremely right, and very well reconciles the difference. *Vide Com. Rep.* 738. and the reason is, because the civil law considering the condition, whether precedent, or subsequent, as unlawful, and absolutely void, the legacy stands pure and simple.

Where the condition is precedent, in our law, the legatary takes nothing till the condition is performed but where it is subsequent he has a right, and the court will decree him the legacy; but then this difference only holds where the legacy is a charge on the real assets.

But in our law, where the condition is precedent, the legatary takes nothing till the condition is performed, and consequently has no right to come and demand the legacy; but it is otherwise where the condition is subsequent, for in that case the legatary has a right, and the court will decree him the legacy; but this difference only holds where the legacy is a charge on the real assets, and therefore, if this had been merely a personal legacy, should have been of opinion that as the marriage without consent would not have precluded *Mary* of her right to this legacy in the ecclesiastical court, no more would it have done so here: and to this purpose several cases were cited, which are taken notice of in the case of *Harvey* and *Aston*, and which I shall not repeat, but refer to that case for them.

The next consideration is, what the consequence will be, taking this legacy as a charge originally laid upon the lands and not merely personal?

[333] But before I enter upon that point, it will be proper to consider how this legacy is given, and in what respect it may be considered as a charge upon the lands.

In the first place, this is certainly a personal legacy issuing out of the personal estate, and chargeable upon that fund, but then the testatrix afterwards at the close of her will charges all her real estate with all her debts and legacies.

I will therefore consider this legacy *first*, as if originally charged upon the lands.

Secondly, As if it was not originally a charge upon the lands, but the lands charged only as auxiliary, upon a deficiency of the personal estate.

[illegible] v. *Desbouverie*, *ante* 2 vol. 261. *Elton* v. *Elton*, 1 *Wils.* 159. 1 *Ves.* 4. [illegible] *post*, 504 S. C.

As to the *first*, If this had been a legacy originally charged on the land, I do not apprehend that the plaintiff could come here to compel trustees to raise the legacy after a breach of the condition, for the legacy being a charge upon the lands, follows the rule of the common law, and is not cognizable in the spiritual court.

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If it had been a legacy originally charged on the land, the plaintiff could not have compelled the trustees to raise it after a breach of the condition, for being charged on land, it follows the rule of the common law.

But where the legacy is merely personal, the court follows the rule of the civil law, because personal legacies are properly cognizable in the ecclesiastical court, and equity has always considered itself as bound to follow the rules of that court, to which the jurisdiction properly belonged.

In personal legacies equity has always followed the rules of the ecclesiastical court, to whom the jurisdiction properly belongs.

As in the case of bond creditors, they are considered here as having a priority to simple contracts, because they have a priority at common law; and the reason is, because the jurisdiction originally and properly belonging to another *forum*, this court will not break in, but will govern themselves by those rules which have been established in that *forum*, to which the jurisdiction properly belongs.

Bond creditors are considered here as having a priority to simple contracts, because they have a priority at common law, for this court govern themselves by rules established in that *forum* to which the juridiction properly belongs

For the same reason, where the legacy is a charge upon the lands to be raised out of the real estate, as the ecclesiastical courts have no jurisdiction, it must be governed by the rules of another *forum*, to which the jurisdiction properly belongs.

This distinction was taken by Lord Chief Baron *Hales* in the case of *Fry* and *Porter*, *vide* 1 *Chan. Cas.* 142. "That although in the civil law in the case of a mere personalty the limitation be void, yet this is a devise of the lands not governed by that law.

* Estates governable by the common law of this kingdom, without relation to *another forum*, ought not to be influenced by another law; and this being a good condition, it cannot be in law defeated, and there being a full breach of the condition, as *law* will not, *equity* cannot help.

This being a good condition it cannot be in law defeated; and if there is a breach of it, as law will not, equity cannot help.

In the present case, the lands may or may not be charged; if considered as originally charged, the legacy must be governed by the same rule as a devise of the land itself would have been, without relation to the rules of another *forum*, or being influenced by another law.

[*334]

The case of *King* versus *Withers*, *Prec. in Canc.* 348. was a devise of 2500*l.* to the testator's daughter at the age of *twenty-one or marriage*; provided she married without the consent of the mother, then 500*l.* part of the 2500*l.* was to cease, and be applied towards payment of debts: That legacy was charged and chargeable on the real estate, and therefore my Lord *Harcourt* says, it must have the same consideration as a devise of lands would have; and he said, the rule that had been insisted on, *viz.* that where there is no devise over, that the condition shall

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be taken only *in terrorem*, was a great deal too wide; but in that case the daughter having attained twenty-one, one of the times appointed, his Lordship held she was intitled to the legacy of 2500 *l*.

If the legacy is considered as a charge originally on the lands, it must have the same consideration as a devise of lands would have, and there nothing can be clearer than that the legacy could not be raised, because nothing vested before the condition performed.

If the legacy therefore in the present case is to be considered as a charge originally upon the said lands, it must have the same consideration as a devise of lands would have; and in that case nothing could be clearer than that the legacy could not be raised, because nothing vested before the condition performed.

So held in *King* versus *Withers*, *Harvey* and *Aston*, *Fry* and *Porter*.

Reports in Chancery in Lord Nottingham's time, is a book of no authority.

The cases which have been cited *e contra*, and come the nearest to the present are 1 *Chanc. Cas.* 58. *Fleming* versus *Waldgrave*, and *Aston* versus *Aston*, 2 *Vern.* 452. and the case of *Needham* versus *Vernon*, reported in a book of no authority, called *Reports in Chan. in Lord Nottingham's time*, *fol.* 62.

But all these cases turned upon different considerations from the present, and were determined either on the particular manner of penning the condition, or because the condition was subsequent, or for some peculiarity in the limitation of the trust.

A material difference between a condition, that the legatary shall not marry without consent, and where it is that she shall not marry against consent.

* In *Fleming* versus *Waldgrave*, the condition was, in case she marries not contrary to the liking of Sir *Edward Waldgrave* and his lady; and there certainly is material difference between a condition that the legatary shall not marry without consent, and where it is that she shall not marry against consent.

[*335] The case of *Aston* versus *Aston*, could not be said to be a decree made by any compulsory power of this court, because the legatary either had, or had not a right; but although the portions were decreed, yet the court requiring security to refund, if the condition should be broken, shews the opinion of the court, that the breach of the condition would be a forfeiture.

As the real estates were not originally made liable, but only as auxiliary, and the charge on them depending on a condition precedent which never was performed, this case must be considered as a mere personal legacy, and as such to be governed by the rules of the civil and ecclesiastical

Thus the case would stand, supposing this to be a legacy originally charged on the lands; but as the real estates were not originally charged, but only as *auxiliary* upon failure of the personalty, and the charge on the lands depending upon a condition precedent, which never was performed, this cannot be considered as a legacy charged, or chargeable on the real estate, but merely as a personal legacy, chargeable upon the personalty only, and as such to be governed by the rules of that court, which has the proper jurisdiction in such cases, and therefore this case differs from *Yates* versus *Fettiplace*, 2 *Vern.* 416. "where a legacy of "3000*l*. was given, charged on the real and personal estate, to "be paid at 21, or marriage, if married with consent, if not, "but 1000*l*. the legatary died at six years of age, and adjudg-"ed that the portion should not be raised for the benefit of her

(1) *Sed vide Prowse v. Abingdon, ante*, 1 vol. 482, 485.

"ad-

"administratrix;" and very rightly; because, in that case, had the legacy vested, and it had been charged on the personalty only, it would have been transmissible, but being originally a charge upon the lands, and the legatary dying before the day of payment, it became a lapsed legacy, to sink in the inheritance, for the benefit of the heir, and that is now a constant rule in equity, established so long ago as the case of *Jennings* versus *Rooke* (1): and the legacy, in the present case depending upon a condition precedent never vested, so far as respects the real estate, but the lands not being originally charged, but only liable to be so, upon performance of the condition, I am of opinion, this case must be considered as a mere personal legacy, and as such to be governed by the rules of the civil and ecclesiastical law. REYNISH v. MARTIN.

The third consideration therefore will be, what remedy the plaintiff will be intitled to in this court? And in regard to that, he is certainly intitled to an account of the personal estate; but as that may be exhausted by the payment of debts and legacies, the next question will be, whether this court cannot marshall *the assets* in such a manner, as to give the plaintiff a remedy out of the real estate; for as the real estate is expresly charged with the payment of all debts and legacies, and this legacy, by the [336] event which has happened, falls out to be a charge upon the personalty only; I am of opinion, that the plaintiff ought to stand in the place of such creditors or legatees as have received a satisfaction out of the personal assets, and to order it so, is the constant rule and practice of this court.

There is another question in respect to the annuity of thirty pounds, *videlicet*, whether the plaintiff is intitled to the arrears *pro ratâ* due to *Mary* before marriage, she marrying before the last half year's payment became due? And although this annuity, or half-yearly payment, is not expresly given for the maintenance of *Mary* as in the case of *Hay* versus *Palmer*, 2 *Vern*. 501, yet I am clear of opinion that it must be understood so, and therefore falls within the reason of that case.

Though the annuity was not expresly given for the daughter's maintenance, yet it must be understood so and falls within the case of *Hay* versus *Palmer*.

Upon the whole, I must direct that the plaintiff be paid the arrears of the thirty pounds *per ann. pro ratâ*, till the time of the marriage; and in case the personal estate should be exhausted by payment of debts or other legacies, that the plaintiff shall stand in the place of such creditors and legatees (2) *pro tanto*, as have received satisfaction, and that so much of the real estate be sold, as will be sufficient to satisfy this legacy of eight hundred pounds, and arrears of the annuity.

(1) *Jennings* v. *Looks*, 2 P.W. 276.S.C.

(2) And shall receive a satisfaction *pro tanto*, out of the real estate, and out of the monies to arise by a sale of a competent part thereof the plaintiff shall be paid so much of said legacy of 800 *l*. and interest as such part of the personal estate, as shall have been exhausted in payment of said debts and legacies, would amount to. *Reg. Lib.* B. 1745, fol. 395.

Case 116. *Lord Townsend and Horatio Townsend* versus *Windham Ash and his Wife*, *May* 13, 1745.

S. C. cited 1 Vef. 422. The plaintiffs proper in coming here to have a difcovery of the deed under which this title arifes, to have it produced at all trials at law, and to have attefted copies, and for an account of profits, without firft eftablifhing their title at law.

THE bill was brought for a fhare in the *New-river* water, and for an account of mefne profits from the death of Sir *James Ash*, the father of the defendant's wife.

" On the marriage of Sir *James*, a fettlement was made of " two fhares in the *New-river* water, and the fame were limited " to Sir *James* for life, remainder to his wife for life, and after " their deceafe, one fhare was limited to fuch of the younger " children of Sir *James Ash* as were not his heir at law, or for " want of fuch iffue, to the fifters of Sir *James*, and their child- " ren, as Sir *James* fhould limit and appoint; and the other fhare " alfo to the fifters and their children, as Sir *James* fhould limit " and appoint; but in cafe of no iffue of Sir *James Ash*, or " if he fhould make no appointment, the fame was limited to " the fifters, and the children of *Catharine*, one of the fifters, " (under whom the plaintiff claims) in fuch manner as they were " intitled to one whole fhare on the death of Sir *James*."

This fettlement being in the cuftody of the defendants, they claimed a right to fuch fhare, in right of the wife, as the heir of her father, as if no fettlement had been made.

[337] They alfo levied a fine of the two fhares in the three counties the waters run through, and received the profits from the death of Sir *James Ash*, in 1733, till the filing of the bill in 1741, when the plaintiffs difcovering there was fuch a fettlement, brought this bill for difcovery, and to be relieved.

The defendants pleaded the fines and non-claim, which plea was over-ruled, to let in all the proof that could be brought of the nature of this eftate; and now the whole came on to be heard, the plaintiffs relying on the fettlement, and the defendants on the fines and non-claim.

The fines were levied in *Hilary* term, 1733, but no claim was fet up, or any kind of entry proved, only that a demand of the profits was made in the office, in the name of the defendants, on the 14th of *February*, and the firft payment was made of the *Chriftmas* dividend before due, on the 23d of *February*, which was after the fine levied, and no other feifin appeared: Sir *James Ash* died in *November*, the firft half year became due at *Chriftmas*, but not received till after the fine was levied as above.

LORD CHANCELLOR,

The defendants have made a great number of objections.

The firft objection was againft the plaintiff's remedy for account of the profits, infifting they ought to eftablifh their title at law, as it is merely legal.

But I am of opinion they are proper in coming here for the remedy, in order to have a difcovery of the deed under which the title

title arises, to have it produced at all trials at law, and to have attested copies. TOWNSEND v. ASH.

A bare discovery therefore not being sufficient, some relief is then necessary; if there was any doubt of the title, I would send them to law. But the bill is to have the benefit of the settlement, and for proper directions necessary to be given concerning it; and therefore though it is a matter of law, yet the court will determine upon it notwithstanding, for it is not necessary for every legal question to be sent to law.

Though it is matter of law, yet the court may determine upon it, for it is not necessary that every legal question be sent *to law*.

There is likewise another relief prayed, *an account of rents and profits*.

* In all cases where questions have arisen about shares in water-works, the parties have constantly come into this court for mesne profits; for tho' it is a legal estate, and corporeal inheritance, yet no one proprietor could receive the profits himself, but the company or their officers are the common hand to receive the profits, and there is no other way to come at it.

Tho' shares in water-works are a legal estate, and corporeal inheritance, yet no one proprietor can receive the profits himself; and as there is no other way to get at it, proper to come into this court for mesne profits.

Where an estate is under such a management, though the legal estate is in the proprietors, it would be absurd to send the plaintiffs to law, for it would be difficult to bring ejectments for a thirty-sixth part and bits of land in several counties, and to bring actions of trespass against *the tertenants* would be very extraordinary, as the management is in the company. [*338]

Therefore in point of remedy there cannot be a stronger case, to come here for an account of profits.

The next question will be as to the title.

First, As to the construction of the settlement.

Secondly, As to the fine and non-claim.

As to the construction of the settlement, it has been said by the defendant's counsel, to be for the benefit of the marriage.

I take it in another light; indeed if the estate had moved from Sir *James Ash*, there might have been some pretence for such a suggestion, but it moved from Lady *Ash*, and manifestly she had an intention of acting for the benefit of her daughters, and their issue, as she had for the children of that marriage, for they were as much her daughters, and their issue as much her grandchildren.

There was no limitation of these water shares to any son or first son of the marriage, *but to the use of all and every child and children other than such as shall be heir at law*.

So that, as he uses the singular number, if there had been only one child, it would have been excluded; or if there had been several daughters, as in point of law they would have made but one united heir, they would have been excluded; or if there had been both sons and daughters, and reduced only to one child, that child could not have taken.

If there had been only one child, it would have been excluded, by the words *other than such as shall be heir at law*, or if there had been several daughters, as they would have made but one united heir, they would have been excluded, or if both sons and daughters, and reduced only to *one child*, that child could not have taken.

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A sister of Sir *James Ash*'s lady was wife of this Lord *Townsend*'s grandfather, and mother of the plaintiff *Horace Townsend*: Mrs. *Windham Ash* being dead without issue, a moiety of the two shares is come to the issue of the other sisters.

Secondly, As to the fine.

Where the parties had no seisin to warrant the fine, courts of law will not presume, or strain a point to work a wrong.

The objection was, that the parties had no seisin to warrant the fine; and I am of opinion if they had not, courts of law will not presume, or strain a point to work a wrong, and no favour is allowed in construction in that case.

Then what kind of possession had Mr. *Windham Ash* and his wife at the time of the fine.

Both sides agree it to be a legal estate, that there was no entry made, and nothing but the perception of rents and profits.

A wrong doer to gain a possession by disseisin must not step on the land, and then leave the rightful owner in possession, which though sufficient to give a seisin on a feoffment is not to levy a fine (1).

It has been said, the entry should be as notorious as possible, but if they had taken out water, or dug the soil, it would not do to gain a seisin in a wrong-doer; for in a wrong-doer, doing the acts of a rightful owner is not sufficient to gain a possession; for if a man enters on my tenant, he does not gain a such a possession to levy a fine thereon, unless he continues in possession; for a wrong-doer to gain a possession by disseisin, must not step on the land, and withdraw and leave the rightful owner in possession, which would be sufficient to gain a seisin on a feoffment, but not to levy a fine.

Next as to the rents and profits, it is said, the perception of then is a sufficient seisin.

But it is answered there was, in fact, no receipt till after the fine levied; if they had received the rents in the present case before the fine, it would be a disseisin. *Hob.* 322. in the case of *Blunden* versus *Baugh*, *Cro. Car.* 202. held by the court of King's Bench, that a receipt of rent from my tenant may be a disseisin, or not, at my election; but if they go on to receive the rents, and levy a fine, it shews *quo animo hoc fecerit*, and is not a receipt as bailiff or receiver.

Evidence of receipt of rent, is a sufficient possession to levy a fine.

The evidence of receipt of rent, if the jury had believed it, would be sufficient possession to levy a fine; and so held in *Dormer* versus *Fortescue* (2).

In this case it is the strongest evidence of possession that can be, for none of the rightful owners receive the rents and profits from the tenants, but the corporation only.

But it is said, the company are a kind of stewards, a common hand to receive and pay the proprietors, and those profits were received by the company at the time of the fine levied, and that [340] the payment by the company after the fine, of profits due before, shall have relation so as to be considered as a payment before the levying of the fine.

(1) *Smith* on *dem. Dormer* v. *Packhurst*, *ante*, 141. (2) *Ante*, 124. S. C.

But

But there is a plain anfwer, the company received for the rightful owner, who were the plaintiffs, and therefore could be no receipt for the defendants at the time of the fine levied; the law allows of fictions and relations to fupport a right, but never to work a wrong.

TOWNSEND v. ASH.

The law allows of fictions and relations to fupport a right, but never to work a wrong.

Going to the office, and claiming, not fufficient; but if a perfon has a right, and is kept out by terror, *a claim is fufficient.*

If a perfon who has a right is kept out by terror, *a claim is fufficient.*

The fine therefore can have no operation to change the right of the parties.

The next queftion is as to the relief.

I muft decree the fettlement to be produced in any court of law or equity, on reafonable notice, it relating to other more confiderable eftates.

There muft alfo be a decree of an account for rents and profits from the time the title accrued, becaufe the fettlement was in the hands of the defendants, and they knew the plaintiff's title, and yet was not difclofed by Sir *James Afh* to Lord *Townfend* in his life-time, which was the ftrong ingredient in *Dormer* verfus *Fortefcue* (1) to decree the account fo far back as the title accrued.

Another ftrong ingredient to decree fo far back is from the nature of the eftate.

For none of the parties are in actual poffeffion of the lands, the *New-river* company having the profits in perception.

As fome body muft account, it would be hard to make the company do it, who have paid it to a wrong perfon, when that very perfon is before the court; and therefore as he is before me, I will decree him to pay it.

Where a reeve or bailiff of a manor pays the rents, if it is to a wrong hand, to be fure he muft pay it over again; but to direct the company in this cafe to pay the plaintiffs, would make a circuity, becaufe the defendants muft be likewife directed to reimburfe the company, and therefore the defendants ought to be decreed to pay in the firft inftance.

Where a bailiff of a manor pays the rents, if it is to a wrong hand, he muft pay it over again.

[341]

I am of opinion too, the defendants muft pay the cofts.

I do not go upon the fraud in the concealment, but on their tenacioufnefs and obftinacy in carrying on the fuit, a defence refting only upon the plea of a fine, on a title gained by diffeifin.

There is no colour to fupport it as a fine and non-claim, as operating upon a diffeifin.

Mr. *Windham Afh* admits by a letter which has been read, that he had the opinion of counfel he had no right, and whether they were his own, or the purchafer's counfel, it is the fame thing, and yet he perfifted in it. Lord *Hardwicke* decreed cofts accordingly.

(1) *Ante* 124, 131. S. C. See the cafes there cited.

Case 117. *Ashurst* versus *Eyres*, *March* 15, 1740.

IN 2 *Tr. Atk.* 51. *it is said, the bill in this case was dismissed*, but on looking into the minutes taken the day and year as above, it is stated as follows: That as to so much of the bill as sought any account for what remained owing upon a bond dated the 5th of *November* 1718, the defendant by his plea insisted, that no part of the 2000*l.* for securing the repayment whereof the bond was executed, was paid to or received by *Henry Eyre*, the defendant's late brother, but the whole was paid unto *Augustine Woolley* [illegible], and received by him for his own use, and that *Henry Eyre* was a surety only for *Woolley*, and that the plaintiff had accepted a composition for what was pretended to be owing on the bond, without the privity of *Henry Eyre*, or of the defendant, and that no demand had been made on the defendant for any money due on the bond for upwards of 18 years, and that *Woolaston* died several years ago seised of a real estate, and possessed of a personal estate, and that his heir at law, or the devisee of his real estate, and also the representatives of his personal estate, ought to be, who were not made parties to the bill. Lord *Hardwicke* held the plea to be good and sufficient, and ordered that the same should stand and be allowed. *N. B. It does not appear by the minutes* [illegible] *the bill* [illegible] *dismissed.*

Case 118. [illegible] versus [illegible], *M*[illegible] 31, 1746.

[342]

A. by will gives to trustees 312*l.* and several jewels in *Venice*, in trust to sell the same, and apply it as a composition, and towards payment of his son's debts, provided the creditors shall within *four months* accept of the same, and discharge his son, if they shall not, then he devises the same effects over to be divided among the children of his son.

"MR. *A*[illegible] by a codicil to his will reciting, that whereas my son *M*[illegible] is indebted to me in the sum of 300[illegible]*l.* I do hereby release the same, [illegible] and bequeath to trustees 312*l.* and several jewels in *V*[illegible], in trust that they shall, as [illegible] conveniently may be, sell the same, and apply the sum [illegible] as a composition and towards [illegible] the debts my said son shall owe, provided [illegible] creditors shall within *four months* accept of the same, and discharge my said son, and if all and every the creditors shall not, then he gives the same effects over, to be divided [illegible] the children of the said son, and if they shall so accept and discharge as aforesaid, then I give to my said son for his subsistence the sum of 600*l.* but if they shall not as aforesaid, then I devise the same over to his children."

The testator died *December* 15, 1742, and the son's creditors filed their bill *April* [illegible] [illegible] to be paid their respective demands. *The plaintiffs by* [illegible] *their acceptance of the* [illegible] *satisfaction of their debts, and* [illegible] *performed the condition annexed according to the true intent of the will.*

The testator died *December* 15. 1742.

The bill was filed by creditors of *Moses Alvares* the 13th of *April* 1743.

The

The plaintiffs brought their bill either to be paid their respective demands, or that directions may be given for the taking an account of the debts due from *Moses Alvares* to them, and that the time for all his creditors coming in to accept the composition offered may be enlarged; the plaintiffs declaring their assent thereto on the terms in the codicil mentioned, and submitting to give releases to *Moses Alvares*, on receiving what shall be due to them of the composition, and that the rings and diamonds may be sold for that purpose, and the money arising thereby, together with the 312*l.* may be put out to interest. FRANCO v. ALVARES.

When this cause came on in *Easter* term, Lord *Hardwicke* doubted, whether the computation ought not to be by lunar months, and ordered it to stand over to ascertain what was the rule in this respect in the ecclesiastical court, who have the original jurisdiction in legacies; and this day the cause came on again.

Mr. Attorney General for the plaintiffs cited the following cases, to shew that the rule of the ecclesiastical court is to go by *calendar months*.

Dig. lib. 50. *tit.* 17. *de diversis regulis juris antiqui*, *sec.* 101. [343]

Lord *Co. Comment.* upon the *St. West.* 2. on the word *Semestre.* 2 *Inst.* 361. *Hob.* 179. 2 *Mod.* 58.

They prove in the first place, what is the rule of the civil and the canon law; and what is now before the court is of spiritual cognisance, for legacies are not properly of original jurisdiction in this court, but suits are instituted here for an account of assets, and therefore there ought not to be different ways of determining the same matter.

There are strong circumstances to shew that the words *four months* must mean *calendar*.

A specific legacy of jewels is given upon a condition to be performed *in four months*, but it did not depend only upon the legatee, for there is an act to be done by the executor, the delivery of the goods to the legatee, for a legacy is not complete till the assent of the executor.

He insisted, the creditors are intitled to have the jewels delivered to them.

Mr. *Yorke* of the same side for the creditors.

The testator, he said, required the plaintiffs to accept of the legacy within four months.

The creditors have declared their readiness to accept, for the bill is an acceptance upon record.

The question is, whether it is filed within time.

They were obliged to apply to this court just in the extremity of time; if *calendar* months are understood, it is within the time, if *lunar* out of it.

In proceedings upon the same matter, the court will determine according to the rule of the ecclesiastical court for the sake of *uniformity*.

The delay of the executor ought not to prejudice a legatee. *Vide* 4 *B. of Swinburne of Wills*, *ch.* 8. *and Powell* versus *Morgan*, 2 *Vern.* 90.

FRANCO v. ALVARES.

Upon the question, whether the devise over, or want of compensation, will make any variation, he cited *Bertie* versus *Falkland*, *Salk.* 231. and *Popham* versus *Bampfield*, 1 *Vern.* 79. and *Dig. lib.* 30. *tit.* 1. *Lex* 40.

[344] Mr. *Wilbraham* for the defendants the granchildren, the devisees over in case the legatees did not accept the condition within the *four months*, cited likewise the case of *Popham* versus *Bampfield*, upon the doctrine of compensation:

That unless the court can give the grandchildren a compensation, the condition cannot be dispensed with, because unless the jewels are given them they cannot have amends by way of damages, for the jewels are directed to be sold.

Lord *Hobart* gives no reason why it should be *calendar* and not lunar months; and wherever an act of parliament mentions *months*, it means lunar. *Vide Brown* versus *Spence*, *Lev.* 101. the two months for reading the articles of religion are to be reckoned by 28 days; and this relates to churchmen. 2 *Roll's Abridg.* 521, 522. under title *Temps* says, in acts of parliament where-ever months are mentioned it means 28 days. *Vide* 4 *Mod.* 185.

It has been said it must be understood to be such a month as that court would construe it, who have the original jurisdiction in legacies, which is the ecclesiastical court, who reckon by *calendar* moths.

They have not of the other side cited any case to shew, that in the ecclesiastical court this point has been determined with regard to it's being *calendar* or *lunar* months, even in the very case of a legacy.

It has been said to be a case of favour, being for payment of debts.

But this is not for the payment of the testator's debts, but of another man's, and a person is under a greater obligation to provide for his grandchildren of his own houshold, than to pay another man's debts.

The plaintiffs ought to shew that they applied as early as they might have done to the executors; for the executor *at Vienna*, who has the jewels, is ready to sell them, if authorised by this court.

LORD CHANCELLOR,

This is a provision made by the father for the benefit of the son (1) to relieve him from his creditors, though he might have had in his view the providing for the grandchildren; yet that was only in the second place, for the first view was to set up his son *de novo* in the world, and to enable him to provide for his children, for he gives him 600 *l.*

[345] The performance of the condition depends upon several facts, for the testator takes notice some of his jewels are at *Vienna*, and to be sold by his executors in *England*.

This being the nature of the legacy, I will take notice first of what is plain, and not to be controverted.

(1) *Moses Alvares* is stated in the Register's book to have been the *grandson* of the testator.

It

FRANCO v. ALVAREZ.

It has been said this is a condition impossible.

Wherever courts of law, or courts of equity, take notice of a *condition impossible*, it must be a natural impossibility arising from an act subsequent, which the party could not avoid, being become impossible by the act of God, as in the cases put in *Co. Lit.* 206. *a.* & *b.* if a man be bound in an obligation, &c. with condition that if the obligor do go from the church of *St. Peter* in *Westminster* to the church of *St. Peter* in *Rome* within three hours, that then the obligation shall be void; the condition is void and impossible, and the obligation standeth good.

No body can say but this might be performed in *four* months, for they might have been sold at *Vienna*, or brought over and sold here, and therefore is not within the rule of conditions impossible.

It has been said to be a case of a condition to be performed, which lies in compensation, and that in many of these cases the court will relieve.

It was truly said by Mr. *Wilbraham*, the question will be about *the object of compensation*, what will become of the devisees over? What compensation will be made to them?

In all cases every person who is interested in the thing must have an equivalent, and as nothing of that kind can be done here, this must be laid out of the case.

The principal question will be, Whether there has been any performance of the condition; and I am of opinion, taking all the circumstances together, here has been a performance.

Several acts are to be done by other persons the executors, and their act is not to make the interest of the grandchildren better, or prejudice the interest of the plaintiffs.

It appears to this day, that the executors have not yet got the jewels from *Vienna*, nor sold them; and it was not the view of the testator that the creditors should give a release for their debts till satisfied, but meant only that they should do an effectual act to declare their acceptance of the devise, and also effectually to release.

By bringing a bill in this court, declaring that upon receiving their several proportions they are ready to give a discharge, is an acceptance upon record, and is a release in equity. [346]

There have been several cases in this court, of legacies given upon condition of releasing, and though an executor has suffered the time to lapse, yet, if legatees have brought their bill for the legacy within the time, the court have determined it to be a sufficient performance of the condition.

Tho' the executors have suffered the time to lapse, yet, if legatees have brought their bill within the time prescribed, the court have, in several cases, determined it to be a sufficient performance of the condition.

I am of opinion here they have done it in the time limited, and that in this case months ought to be considered as *calendar ones*.

Months ought to be considered here as *calendar* ones.

It

FRANCO v. ALVARES.

The word *months* in acts of parliament means lunar, except in the case of *Tempus Semestre* with regard to lapse of livings, and the other instance of the six months allowed in respect to *prohibitions*.

It has been truly said in acts of parliament the word months means lunar, except in the case of *Tempus Semestre* with regard to lapse of livings, and the other case of the *six months* allowed in respect to prohibitions, both upon the same reason, because relative to and according to the computation of time in the ecclesiastical court.

This is extremely different from the case cited by Mr. *Wilbraham* in *Levinz*, for that only concerned ecclesiastical persons.

The rule in the ecclesiastical court is not, that it shall take place wherever ecclesiastical persons are concerned, but only where it relates to their proceedings.

This court has a concurrent jurisdiction with the ecclesiastical court in legacies, who determine according to the rule of the civil law.

If I did not follow their rule, it has been truly said, there would be no uniformity in proceedings, and would leave it to the power of the party to make it just as he pleases.

It has been objected that the creditors have been guilty of laches, in letting so much of the four months run out before they brought their bill.

The time incurred in the life of the ancestor shall run upon the infant.

Now where time runs against an ancestor, and then the right descends upon the infant, the time incurred in the life of the ancestor shall run upon the infant.

But in this case no laches are to be imputed to the plaintiffs, because here were acts to be done by others the executors.

[347] The bill was an express acceptance, and in the consideration of this court a release, and therefore I must decree an account to be taken of the plaintiff's debts.

Lord Chancellor declared, that the plaintiffs by bringing their bill within *four calendar months*, "after the testator's decease," and thereby declaring their acceptance of the legacies given by the testator's will towards satisfaction of their debts, and offering to release on payment of their respective proportions, have performed the condition annexed to the legacies according to the true intent of the will; and decreed the executors to make sale of the jewels given by the will to them for the trusts therein mentioned, and that the money arising by such sale, together with the 312 *l.* be applied by them in payment of the several debts due from *Moses Alvares* to the plaintiffs respectively in average, and after an equal pound rate, in proportion to their respective debts, and on such payment that the several creditors do execute releases to *Moses Alvares* of their respective debts (1).

(1) *Reg. Lib.* A. 1745, fol. 542.

Trafford versus *Trafford*, *June* 3, 1746. Case 119.

" SIGISMUND *Trafford* being seised in fee of divers " manors, lands, and tenements, on the 20th of *May*, 1715, " made his will and thereby devised all his manors, &c. to the " use of *T. W.* his heirs and assigns, that he might stand seised " of the same in trust for *Sigismund Boehm*, eldest son of *Ann* " *Boehm* for life, remainder in trust for his first and other sons " in tail male, remainder in trust for *Clement Boehm*, the plain-" tiff's father, the second son of *Ann Boehm* for life, remaind-" er in trust for his first and other sons in tail male, remainder " in trust for the defendant *Charles Boehm*, third son of *Ann* " *Boehm*, for life, remainder in trust for his first and other sons " in tail male, remainder in trust for the testator's right heirs. " The testator also devised all his *plate*, *books*, *pictures and* " *household goods*, of what nature soever, to such male per-" son (when he should attain 21), who should then be intitled " to the trust in possession of the real estates therein before de-" vised, and directed that all such male person should attain 21, " the said *plate*, *books*, *pictures*, *and household goods*, should be kept " at *Dunton Hall*, and be used in the mean time by such male " person residing there, the testator declaring it to be his ex-" press will and desire, that the said *plate*, *books*, *pictures*, *and* " *household goods*, might, in the nature of heir-looms, go with " his real estate, and be used therewith, as long as the law of " this realm would permit. He appointed *Thomas White* exe-" cutor, and bequeathes the residue of his personal estate to such " person (when of the age of 21) as by his will should be inti-" tled to the trust in possession of the lands."

S. T. devised all his books, pictures and household goods, to such male person when he should attain 21, who should then be intitled to the trust in possession of his real estate, [illegible] vised, and [illegible] directed they should be kept at Dunton-hall, and be used in the mean time by such male person residing there, declaring it to be his will and desire, that they might go in the nature of heir-looms, with his estate, and be used therewith as long as the law of this realm would permit. The pictures, books and household goods [illegible] to go as heir-looms, in as full a manner as [illegible]

[illegible] only for the use, till such person who is intitled to the [illegible] 21 (1).

S[illegible] 6, 1722. The testator made a codicil, whereby he devised to *Ann Beveridge* since deceased, the use of all his plate for life, and thereby declared that all his pictures at *Dunton Hall* should at all times go and be enjoyed with his mansion-house and estate at *Dunton* by the persons who, by his will, should successively hold his estates (2). And by the codicil he makes *Sigismund Boehm* joint executor with *Thomas White*. [*348]

The bill was brought for the heir-looms by the plaintiff, who is tenant in tail of the estate, but not of age.

(1) *Vide* [illegible] v. [illegible], 1 *Ves.* 207. *Duke of Bridgewater* v. *Egerton*, 2 *Ves.* 121. 1 *Bro. Cha. Rep.* 280 S. C. in note. *Gower* v. *Grosvenor*, *Barn. Cha. Rep.* 54. *Foley* v. *Burnell*, 1 *Bro. Cha. Rep.* 274. *Vaughan* v. *Burslem*, 3 *Bro. Cha. Rep.* 101.

(2) He also bequeaths his plate to *Sigismund* after the death of *Ann Beveridge*, if living, otherwise to such person, to whom the bulk of his estate would belong after *Sigismund*'s decease.

LORD

Trafford v. Trafford.

LORD CHANCELLOR,

The question upon the will and codicil of the testator, is, as to the extent of the bequests, and that will depend upon the construction of the will and codicil.

I really think the true construction of the will must put an end to the question.

The disposition of real estate only among males I mention for the sake of an observation afterwards.

Here is a plain intention by the will to constitute heir-looms, therefore the testator by the will has added this clause, all my plate, &c. to go in the nature, &c.

The construction the plaintiff's counsel put upon it is, that by the penning of this clause, and particularly by the operation of the latter words, these things are to go as heir-looms as far as by law they may.

The construction of the defendant's counsel is, that it ought not to have this large construction, of going in succession as heir-looms from person to person, but should vest in the first taker, whether tenant for life or tenant in tail, and he shall have the absolute property at 21.

But I am of opinion that the exposition ought to be, that it should go in such kind of succession as I directed in the case of *Lawson* versus *Grosvenor* (1).

The first clause, I allow, would give the absolute property if it stopped there, but I am not warranted to rest there, for the whole clause must be taken together, so as that it may be intirely consistent.

[349]

As to the last clause, suppose that had been the single one, it would have been sufficient to make all these go as heir-looms, and to wait the contingency; and of that opinion I was in *Lawson* versus *Grosvenor*, for the words there were extremely like them, though not exactly the same.

The last words therefore must be construed as a disposition only of *the use*, until some person who is intitled to the inheritance should come into possession by attaining 21.

It has been objected, that the testator has distinguished between the property and the use, for there is a mesne disposition. And if there had been no more than the gift, and then remaining at *Dutton*, it would have been a right construction; but then he says *to go in succession as far as the law will permit.*

There is a direction to executors, whom, by virtue of his last clause he has made trustees for this purpose, what should be done in the mean time, and not to hinder them of the use before they come of age.

To say they should only go as *heir-looms*, till a tenant for life attain twenty-one, is a forced construction; for what is there then of the nature of inheritance in these heir-looms if they should stop there?

It has been said, he has made the gift of his residue equally an heir-loom, and that the plaintiff might as well contend this should go to him.

(1) *Barn. Cha. Rep.* 54. S. C.

By no means, for the devise of the residue wants the very clause, which constitutes and makes the other go as heir-looms. TRAFFORD v. TRAFFORD.

Therefore I am of opinion they ought to go as heir-looms, in as full manner as the law will allow; and this court is now established to be the law of the land, as much as any other jurisdiction.

If this be the true construction of the will, the next question is, whether the codicil has made any change.

The will consisted of four parts, plate, pictures, books, and household goods.

By the codicil he devises the use of all his plate to Mrs. *Beveridge* for life, consequently the will is varied so far, and taken out of the gift of heir-looms.

What is there that makes any alteration as to the books and household goods? These are not mentioned in the codicil, and therefore remain as they were. [350]

It is said the word *residue* includes them.

If the word *residue* was to include the whole personal estate not specified in the codicil, it would destroy the will, because it would revoke the other legacies, and several other specific things, as annuities, &c. are given under the will.

I am of opinion too, as the testator had made such an accurate disposition of his *goods and books*, and the codicil was made only seven years after the will, that it is strong to shew he still intended furniture of such a recent date should go *as heir-looms*.

" And therefore I declare, the testator's pictures, books, and " household goods, ought to be considered as heir-looms, and to " go along with his real estate, as far as by the rules of law or " equity they may, and that the plaintiff will be intitled to the " property thereof, in case he shall attain his age of twenty-one " years, and in the mean time is intitled to the use and enjoy- " ment thereof; and ordered that the Master do inquire what " pictures, books and household goods of the testator are now " remaining in specie, and that two schedules be made thereof, " and one of them deposited with the Master, and the other with " the defendant *Charles Boehm*, and that such pictures, books, " and household goods do remain in testator's mansion-house at " *Dunton-hall*, pursuant to the directions in his will; but as to " any pictures, books, and household goods which belonged to " *Sigismund Trafford*, the husband of *Elizabeth*, I declare they do " belong to her, and order that they be delivered to her (1)."

(1) *Reg. Lib.* B. 1745, fol. 289.

Case 120. *Anon.* *June* 5, 1746.

The owners of two privateers seized upon the ship called the *Diligence* as lawful prize, upon its appearing by her captain's papers she had carried provisions to the enemy, and he signed a note, by which he acknowledged that they had very justly confiscated his cargo, the captain of the *Diligence* brings a bill here for an injunction to the court of Admiralty to stay a suit depending there on the lawfulness of this transaction, suggesting that some of the papers are lost, and that if the note should be produced which he was obliged to give, he must certainly be cast at law. *The injunction denied, for if it was to be granted upon such pretence, it would entirely defeat the act of parliament relating to prizes.*

MR. *Brown* moved for an injunction to the court of Admiralty, to stay the proceedings there in a suit for the condemnation of a ship called *the Diligence*.

She had made a voyage to *[illegible]* from *Ireland*, and lying afterwards in the *Downs*, where the *Eagle* and *[illegible]* privateers were at anchor, they sent persons on board to search her, and looking [351] upon her as a lawful prize, for carrying, as they pretended it appeared by the captain's papers, provisions to the enemy, they seized upon her cargo, and all his papers, and kept the captain in custody for some days, and before they released him, made him sign a note, by which he acknowledged that they had very justly confiscated the cargo, for the reason aforesaid, and then gave him leave to go to *Rotterdam*, it being stormy weather, and not safe for the ship to lie there, the captain of her returned to the *Downs*, and the same privateers boarded her again, and took away her cargo a second time.

There is a suit now depending upon the lawfulness of this transaction, in the court of Admiralty, and the captain and the owners of *the Diligence* have brought their bill here, suggesting that some of their papers are lost, or refused to be produced, and that if the defendants should proceed to the trial there, and be allowed to produce the note which they obliged the captain to sign, he must certainly be cast in the suit.

Lord Chancellor denied the injunction, and said if he was to grant it upon such pretence, it would entirely defeat the act of parliament in relation to prizes, for upon every man of war's, or privateer's taking a ship, the owners of it would immediately come into this court, and pray an injunction to stay the proceedings in the Admiralty, in order to prevent her being condemned, especially if the captains of the men of war, or privateers, as is the present case, should be gone out again on another cruise.

If upon examination the court of Admiralty find the signing the note was owing to duress and imprisonment, they can by their own authority suppress it.

He said besides, the suggestions in this bill were not a sufficient foundation for the injunction, because if they were true, the court of Admiralty could by their own rules, as well as this court, put it into a method of inquiry, both as to the facts which are charged with regard to the sinking and concealing some of the papers, and likewise as to the note, which the plaintiff pretends was extorted from him, and if upon examination they found it was owing to duress and imprisonment, they could by virtue of their own power and authority suppress it, and not suffer it to be given in evidence.

His Lordship therefore denied the injunction.

Edgell versus *Haywood and Dawe*, *June* 9, 1746. Case 121.

JOHN *Dawe* by bond dated *December* 6. 1726, became bound to the plaintiff *Elizabeth*'s father, *Richard Chaffin*, in 200*l.* conditioned for payment of 100*l.* and interest, who died intestate before the 100*l.* or any interest for it, was paid, and administration was granted to the plaintiff *Elizabeth* his only child, whereby she and her late husband became intitled to have what was due on the bond, for which they brought their action at law in the court of Common Pleas against *Dawe*, and in *Michaelmas* term, 1741, *Dawe* pleaded thereto, and admitting the bond was his deed, and that he owed *Richard Chaffin* at his death the said 200*l.* and that he did detain the same from the plaintiffs, but that they ought not to have execution against his person; for, according to an act of parliament for relief of insolvent debtors, he was beyond the seas on the first of *January* 1736, and returned and surrendered himself to the keeper of the King's Bench prison, and on the 11th of *July*, 1738, was duly discharged by virtue of the act, whereby he became intitled to the benefit thereof; the plaintiffs replied and confessed the plea, and took judgment for the 200*l.* debt and 5*l.* damages, to be levied on the lands, tenements, goods and chattels of *Dawe*. *William Madox*, by will dated the 27th of *June* 1737, gave *Dawe* 1000*l.* to be due and payable to him, by his executor therein named, in one month after the testator's death: The plaintiff and her husband, in order to get a satisfaction for the debt, sued out a *fieri facias* on their judgment against the goods and chattels of *Dawe*, and the legacy being then due, but unpaid, and in the hands of the defendant *Haywood*, the executor of *William Madox*, they lodged *their fieri facias* with the sheriff of *Middlesex*, and took a warrant thereon to levy their debt and damages out of the legacy in his hands, which he refused to pay; and as the plaintiffs could not levy the same on the legacy in *Haywood*'s hands, or compel him by law to pay the same, or discover the assets that were liable to pay it, or stay the defendant *Dawe* from receiving the money till he should pay the debt, they have brought their bill for an injunction against *Dawe* to restrain him from receiving it, and that *Haywood* the executor may either admit assets to satisfy so much of the legacy as the plaintiff's debt amounted to, or account for the real and personal estate of *William Madox*, and pay the plaintiffs their debt thereout.

J. D. being indebted to C. by bond in 200l. the plaintiff, the administratrix of C. brought an action against D. who pleaded the act for relief of insolvent debtors, and that he was duly discharged; the plaintiff took judgment for the 200l. and 5l. damages: W. M. by will gave D. 1000l. to be paid to him by his executor in a month after the testator's death; the plaintiff sued out a fieri ficias on his judgment, and lodged it with the sheriff, and took a warrant to levy the debt out of the legacy, and brings his bill against the executor of W. M. to admit assets to so much of the legacy as the plaintiff's debt amounts to, &c. The plaintiff has pursued a proper remedy, and what shall be found due for principal, interest, and costs at law and in equity ought to be satisfied out of what is due to D. on account of his legacy.

The defendants, and particularly *Haywood*, insisted on two points, First, that the plaintiffs were improper in equity to attach *Dawe*'s legacy, being a *chose in action*, not reduced into the possession of the debtor. Secondly, if they were proper in their relief as to that point, yet the legacy was no charge on the real estate, but on the personal only, which was a deficient fund: This last point depended on the words of the will, which were; [353]

"I *William Madox* of, &c. do make this my last will and testament in manner and form following; First, I give and bequeath to Mrs. *Susannah Rhodes* the sum of 1000*l.* to be due and payable unto her by my executor, whom I shall herein appoint,

"after

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"after the expiration one month next after my decease (1); also "I give to her all my houshold goods, plate, *China* ware, linen, "woollen, and wearing apparel: Also I give to my cousin *John* "*Dawe* the sum of 1000*l.* to be due and payable to him by my "executor, whom I shall herein appoint, after the expiration "of one month next after my decease; Also I give unto *Richard* "*West* and his brother *Thomas West* the sum of 100*l.* in trust ne-"vertheless for the sole use of *Rebecca Hunt*, wife of *James Hunt*, "exclusive of any right the said *James Hunt* her husband shall or "may claim to the same, to be due or payable to them, after the "expiration of one month next after my decease, by my herein "appointed executor: Also I give, devise and bequeath to Mr. "*Thomas Haywood* of, &c. and to his heirs for ever, whom I do "hereby make, ordain, constitute and appoint my only whole "and sole executor of this my last will and testament, all my "goods, land and chattels, except what is herein before "given, and I do hereby revoke, disallow and disannul all other "legacies heretofore willed or made by me."

As to the first point, the counsel for the plaintiff relied on the 20th *sect.* of the *St.* 10 *Geo.* 2. *c.* 26. whereby a remedy is provided for the creditor on *the future effects* of the debtor.

"Provided, &c. that notwithstanding the prisoner's discharge "as to his person, all prior debts and judgments shall stand and "be effectual to all intents against the lands, tenements, goods "and chattels of the prisoner, which he or any in trust for him "at the time of the discharge had, or at any time then after "should be any ways seised or possessed of, interested in, or intitled "unto, either in law or equity, and the creditors may take out "a new execution against the lands, goods, &c. in the same "manner as they might have done had the prisoner never been "taken in execution."

It was said, that if a court of equity did not give relief in this case by subjecting this legacy to the plaintiff's demand; the intent of the statute would be evaded, since if *Dawe* got the money into his hands as they could not take his person, and thereby compel him to pay the debt, they would be absolutely without remedy.

[354] That they had lost their remedy at law by this statute, where they might attach this very legacy by proceeding to an outlawry; and then bringing an information in the name of the Attorney General in a court of revenue, and so attach this by the interposition of the crown for their demand, which, though a matter of grace, is by constant custom grown into a right in creditors, which a court of equity ought to take notice of; but since this statute, that remedy could not be had, because they could not proceed to an outlawry; there is therefore no remedy but this, to answer the plain intent of the act, and preserve the future effects for the creditors.

As to the other point, the counsel for the plaintiff cited Lord *Warrington* versus *Langham*, *Prec. in Chanc.* 89. that the execu-

(1) The following part of this will is not stated in the Register's book.

tor

tor here is named a devisee, which is always a strong circumstance in making a construction to satisfy the will; that by the last clause the lands, goods and chattels are blended together as one fund, and given subject to an exception of what was given before, which they contended amounted to the same thing, as if he had given him the residue of both estates after what he had given before. EDGELL v. HAYWOOD.

For the defendant it was argued as to the first point, that the restrictive words at the end of the clause, shewed that it was the intent of the act only to exempt the person of the debtor, and leave all other remedies which the creditors might have just in the same state they were before the act was made, and not to give the creditor a new and different remedy on these effects.

That the reason why this court did not give a specific lien to creditors, further than the law did, was, because such creditors did not trust upon the faith of such lien, but on the general credit, and therefore this court never gave a specific lien on *choses in actions* to one creditor more than another, except only where there was an actual assignment of such *chose in action* as a security, and going farther was breaking in upon that equal satisfaction which all creditors have a right to over the effects of the debtor, not subject to any legal or equitable lien.

If a court of equity was therefore, by reason of this inconvenience suggested, to give any further remedy to creditors on account of this statute, such new remedy must be agreeable to the principles of equity, and co-extensive with that inconvenience, which the remedy of giving specific execution to a particular creditor is not; for to which creditor should this belong? For suppose an assignment made of this legacy after the judgment, or even after the *fieri facias*, would equity take away the benefit of that specific lien which the assignee has by the rules of this court, and give it to a general creditor by judgment merely by force of this statute?

This would be changing the rights of parties, and not barely giving a further remedy; suppose all the other creditors brought bills, those not by judgment, as well as those by judgment, to which would equity give the preference? Since all general creditors cannot have preference in equity over assets, further than the law gives it them, equality of distribution is what equity aims at where the rules of law do not prevent it. The *fieri facias* is not returned *nulla bona*, nor is it charged that there are no other effects upon which it ought to have been executed; there is no necessity therefore to resort to this remedy, and the less reason to assist the plaintiff than any other creditor, who cannot attach his other goods, nor yet get at his person. [355]

It was therefore insisted, that a court of equity in this case could not give relief to a particular creditor, further than the law does, without infringing its general principles, and altering the rights of others: That an executor is intitled to a release from the legatee, but if by this act every little creditor can in equity charge his debt on the legacy, he will be unavoidably subject to a variety of suits, till the whole is exhausted.

ENGELL v. HAYWOOD.

Either therefore equity must give this new specific remedy over *choses in action*, to creditors in general of an insolvent debtor, and not to one only; or else the creditors must take this privilege (which in most instances creditors of bankrupts are deprived of) of taking out execution against future effects, subject to the inconvenience and difficulties which the law has left them under in that respect, and which the legislature perhaps did not foresee.

As to the second point, it was said, that the courts of equity had of late been very favourable in their constructions to charge debts on land, or debts and legacies, where both are coupled together, and one could not be held to be a charge without holding the other to be so at the same time; yet that in the case of legacies only, a plain intent was required, because *prima facie*, and independent of the intent, there was no more reason in equity to charge legacies on lands devised, where the general estate was insufficient, than to charge personal legacies in favour of a devisee of land, if his land was evicted, both being specifick, and independent bounties to each other.

There is no general declaration that the legacies should be paid in the first place, or even that they should be paid at all, as in that case cited in *Prec. in Chan.* the being executor and devisee has never been held sufficient to charge an executor with legacies, though possibly it may be an ingredient in such a construction, and *Guillim* versus *Holland* in *July* 1741, and *Corfield* versus *Lingen* the 4th of *March* 1739, were cited where the executor was also devisee, and in the last case the land was given as a

[356] residue, and yet the legacies were not charged on the real estate.

That with respect to the exception, the utmost force of it could only be considered as putting him in the same light as if the bequest had been by way of residue, and then that would not have charged the lands according to the authority of the case last cited.

But the plain intent of the exception was, an unnecessary caution to prevent the specific legacies given before from passing by the word *chattels* to which the exception is subjected, but as no lands were given before in the will, to apply the exception to the lands, is to make the will nonsense.

LORD CHANCELLOR,

As to the first question, it is a new case, and as far as it is a general question, I am of opinion the plaintiff, as a judgment creditor, could not come into this court for a satisfaction out of this legacy, and so I apprehend it has often been determined; there are very few cases where it is necessary for this court to give relief to creditors over personal chattels in possession, [illegible]use assignments of them to defeat creditors are void and fraudulent at law.

Choses in [illegible] are [illegible] to an e[illegible], but the [illegible]or may [illegible] pel[illegible] But, as to *choses in action*, according to the general rules of this court, they are not liable to executions, not for the reasons given by the defendant's counsel, but because the court takes

[illegible]on, by seizing the person, or, where that cannot be taken, by proceeding to an outlawry, and [illegible] lands as well as effects, by a capias utlagatum.

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notice that the creditor has a method, by the ordinary rules of law, either by compelling satisfaction, by seizing the person, or, where that cannot be taken, by proceeding to an outlawry, and taking the lands as well as effects, by a *capias utlagatum*, which, though a proceeding by the crown, and at first a matter of grace, yet now is the ordinary course of proceeding in the King's court of revenue, where grants of such things to creditors are constantly given, and that has been the chief ground upon which this court has proceeded in denying a specifick remedy.

This brings me to the question made on the statute for relief of insolvent debtors.

This statute was intended to be beneficial to creditors as to the *subsequent effects*, and to discharge the person of the debtor only.

Though it has been called a privilege, it is none, but a reservation to the creditor of his right in every respect, except *that of seizing the person, and it differs from the case of bankrupts, where the future effects cannot be discharged without the consent of four-fifths of the creditors: as the act is therefore for the benefit of creditors, it must be construed beneficially, and so as to give them effectually all the benefit intended them over the future effects.

The statute for relief of insolvent debtors, is for the benefit of creditors, and must be so construed, as to give them effectually all the benefit intended them over future effects.

This has been treated as a saving clause, but I am of opinion that it is an enacting one, giving the creditor a competent remedy upon *the future effects*, as the statute precluded him from seizing or outlawing the person; and it could never be intended, that though the debtor had ever so large a property in *choses in action*, the creditors should have no remedy to come at them. [*357]

With regard to the words relied on in the latter part of the clause by the defendants, to shew the remedy was to be the same as before the statute;

It is plain there are two different provisions made in the clause, by the first part as to creditors in general who had not sued execution before the statute; where the words as to the remedy over the future effects are general; the latter part as to creditors who had already sued out an execution, and the latter words relate to such new execution only, and do not run through the whole clause.

It is objected, that this is a suit by one creditor only, and ought to be by all; but the person who first sues has an advantage by his legal diligence in all cases, and of chattels in possession, the first suit has the first satisfaction, and the act has made no such general provision for all creditors.

In all cases of chattels in possession, the first suit has the first satisfaction.

The court does not proceed in this case on the ground of a specific lien, but only considers it as a part of the property of the debtor, which the creditor cannot come at without the aid of this court.

If, therefore, after the judgment, or even after the *fieri facias*, the debtor had assigned this *bona fide*, and for a valuable conside-

If after the *fieri facias* the debtor had assigned the legacy for a valuable consideration, and without notice, it would have been good against this creditor.

ration.

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ration, and without notice, it would be good and prevail against this creditor.

But after a bill brought, and a *lis pendens* created as to this thing, such assignment could not prevail; I am therefore of opinion, that the court ought to interpose in this case, and that the plaintiff has pursued a proper remedy.

The next question will be as to the right?

I am of opinion that this legacy is a charge upon the real estate.

[358] I think this will not depend upon the authority of those cases, where debts and legacies are charged in the first place, but depends on the particular wording of the will.

Suppose the executor was not devisee, but another person, and the testator had directed the legacies to be paid by him, it would be a clear charge on the estate, and calling him executor in the clause where the legacy is given is only descriptive of his person, and not of his office, and amounts to the same as if he had said to be paid by Mr. *Thomas Haywood*.

The legacy is a charge on the lands, for the words, *subject to the exception of what was given before*, amount to the same as if the testator had given his goods, lands and chattels, subject to what was given before.

The goods, *lands* and chattels are given altogether as one fund, and lands are inserted in the middle, and the whole are subject to the exception of what was given before; this, I think, amounts to the same, *as if he had given them subject to what was given before*; therefore, I think this legacy is a charge on the lands (1).

His Lordship ordered the Master to take an account of what is due to the plaintiff for the principal sum of 100 *l.* with interest at 5 *per cent.* and for her costs at law, and in this court, and declared, that what shall be found due to her for principal, interest and costs, ought to be satisfied out of what is due to *Dawe* for principal and interest of his legacy of 1000 *l.* given by the will of *William Madox*, and the Master to take an account of what is so due to *Dawe*, with interest at 4 *per cent.* from one month after the death of *William Madox*, and in case *Haywood* shall not pay the plaintiff as above within six months after the master's report, the real estate of *William Madox*, or so much as shall be sufficient to pay the plaintiff, shall be sold, and the money arising therefrom to be applied, in the first place, towards satisfaction of the plaintiff's debt in the manner as is already directed (2).

(1) *Vide Cheeseman* v. *Partridge*, *ante* 1 vol. 436.

(2) *Reg. Lib.* A. 1745. fol. 463.

Seymore versus *Tresilian*, *July* 16, 1737. Case 122.

A Bill was brought by a wife for her *paraphernalia*.

A husband cannot devise away a wife's *paraphernalia*, he can only bar her by acts done in his life-time.

The husband by his will had given her ten thousand pounds, upon condition she gave up her right of dower, and likewise devised to her "all her wearing apparel, and ornaments of her "person, her gold watch, and all her jewels, except some "round a picture, *and devised the residue* of his estate to the "defendant."

Afterwards, by a codicil, he revokes the devise of *his* jewels, and *her* pearl necklace, which he gives away to *A*. then by a second codicil he gives her *a pair of diamond ear-rings*; upon this, the defendant insisted she could not claim these *paraphernalia*, because it is plainly contrary to the will and codicil under which she claims the 10,000 *l*. and equity will not permit one to claim under one part of a will, and controvert another. [359]

That by the devise of the residue, the revocation of the devise of the jewels, and the gift of the ear-rings only, it appeared to be the testator's intention that the rest of the *paraphernalia*, except the ear-rings, should go *to the defendant* as the residue of his estate.

LORD CHANCELLOR,

It is plain the *paraphernalia* are included in the devises in the will, but a husband cannot devise away a wife's *paraphernalia* (1), he can only bar her by acts done in his life-time (2).

The revocation is of the devise of *his* jewels, which seem to be contradistinguished from *hers* in the will, which are there called the ornaments of *her* person, and the diamond ear-rings do not appear to have been ever worn by her, and therefore might not be part of her *paraphernalia*.

But suppose the testator had completely revoked the devise, it is only a revocation of a devise void in itself, and therefore it is too much strained to infer from thence an intention that her rights should pass by the devise of the residue of his estate; his Lordship decreed for the plaintiff. *Vide the case of Tipping* versus *Tipping*, 1 *P. Wms*. 722.

(1) *Northey*, v. *Northey ante* 2 vol. 79. v. *Douglas*, *Ca. Car*. 343. *Marshall* v. *Blew*, *ibid*. 217. *V.de Hastings* (2) *Graham* v. *Londonderry*, post, 394.

Tucker versus *Phipps*, *July* 10, 1746. Case 123.

S. C. cited 1 Ves. 284.

THE bill was brought by the plaintiff suggesting, that his wife's father had by his will left a legacy of fifteen hundred pounds to the plaintiff's wife, his daughter; and that the

The *spoliation* in this case being clearly proved, is sufficient to intitle the plaintiff to come here in the first instance for a decree without putting him to the trouble and expence of citing the defendant into the spiritual court.

defendant

Tucker v. Phipps.

defendant *William Phipps* had destroyed or concealed the said will, and therefore prayed he might be decreed to pay the plaintiff fifteen hundred pounds, and interest.

The defendant put in three answers; in the first, he admitted the will as set forth in the bill, but made no mention of any insanity in the testator; in the third answer, denies he ever had any such will, and says, if there ever was any such, he cannot say whether his father was, at the time of making such will, of sound mind; and for the defendant it was insisted, that the plaintiff came here too soon, for that he ought to have cited the defendant into the ecclesiastical court, where he might have the benefit of a discovery equally as well as here.

[360] LORD CHANCELLOR,

The point of insanity creates the only difficulty, for the *factum* of the will is not only proved, but also admitted.

In this court the rule is not to allow a suit against an executor for a legacy, before a probate of the will (1), but, in the present case, the plaintiff ought not to be put to the difficulty of going into the spiritual court to cite the defendant, because that would be giving the defendant a great advantage from his own bad acts in destroying or suppressing the will, for here the *spoliation* is, I think, proved so sufficiently, as to intitle the plaintiff to come here in the first instance for a decree.

Though in a personal legacy where the will is destroyed or concealed, the rule is to cite the executor into the ecclesiastical court, yet the legatee may properly come here on the head of *spoliation* and *suppression*.

As to *the spoliation*, consider it generally as a personal legacy, where the will is destroyed or concealed by the executor, and I think, in such a case, if the *spoliation* is proved plainly (though the general rule is to cite the executor into the ecclesiastical court) the legatee may properly come here for a decree upon the head of *spoliation* and *suppression*.

There are several cases, where if *spoliation* or *suppression* are proved, it will change the jurisdiction, and give this court a jurisdiction which it had not originally; as in the case of Lord *Hunsdon*. *Hob*. 109.

Though it was a title merely at law, yet there being a suppression of the deeds under which the title accrued, the plaintiff, in Lord *Hunsdon's* case, had a decree in equity for possession.

"Where the title was a title merely at law, yet there being "a suppression of the deeds under which that title accrued, the "plaintiff had a decree here for possession, and quiet enjoy-"ment."

As the jurisdiction may be changed with regard to a court of law, why may it not with regard to the spiritual court; and I think the case of *Weeks* versus *Weeks*, which came before me some time ago, an authority that it may: here the *spoliation* or *suppression* is certainly fraudulent, voluntary, and malicious, and therefore differs from the case of *Pascall* versus *Pickering* (2), where the *spoliation* did by no means appear to fraudulent or

(1) Contra *Phipps v. Steward*, ante 1 vol. 285. *Smith v. Blackwell*, [illegible] 566.

(2) S. C. 1 *Ves*. 285.

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malicious, but rather inadvertently done, and without any bad design. TUCKER v. PHIPPS.

I think in such cases of malicious and fraudulent *spoliations*, the court will not put the plaintiff under the difficulty of going into the ecclesiastical court, where he must meet with much more difficulty than proving the contents of a deed at law, which has been lost or secreted.

For in the spiritual court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, which will be a difficulty almost insuperable, and which courts of law do not put a person upon doing; the plaintiff must also prove the whole will, though the remainder of it does not at all belong to, or regard his legacy.

[361]

The plaintiff in the spiritual court must have proved it a will in writing, and the very words, and also the whole will, tho' the remainder does not at all regard his legacy, and which courts of law do not put a person upon doing.

I think, if this had been a mere personal legacy, the court, under the circumstances of this case, ought to interpose, and the rather, because in bringing suits against an executor, this court goes further in requiring a probate than courts at law.

But here the case is stronger to intitle the plaintiff to a decree, because the legacy is out of real and personal estate both, and as to the real estate, there is no occasion to prove the will in the spiritual conrt to intitle the legatee to recover his legacy out of the real estate.

There is no occasion to prove a will in the spiritual court to intitle a legatee to recover his legacy out of the real estate.

This would be clearly the case, where the charge is only upon the real estate, and though the heir is intitled to have the personal estate to exonerate his real, yet if he is made executor, and has, by a voluntary and fraudulent act, put the legatee under such difficulties as make it almost impossible for him to prove the will, it is reasonable to let in the legatee to have his legacy, and leave the executor to pay himself out of the personal estate.

As to the *insanity*, the defendant's proofs speak in general terms only, to the testator's being in a weak condition; but compare this with the plaintiff's evidence, and the manner of the defendant's introducing the insanity in his answer, and the acts he has done under the will.

The insanity is not mentioned till the third answer, and then very tenderly; the plaintiff's proofs are very positive as to the sanity of the testator; they are the three subscribing witnesses, whose testimony is by no means impeached; the will a reasonable one, not made in secret, but several persons were present; the defendant has brought actions, and sworn himself surviving executor, and has acted several years under the will without ever making any pretence of insanity in the testator.

I am therefore of opinion, that, under the circumstances of this case, it is not proper to direct a trial at law as to the sanity

Not necessary in this case to direct a trial at law as to the testator's sanity, for the plaintiff is clearly intitled to an immediate decree for the payment of his legacy, though the probate of the will has not been granted.

Tucker v. Prison.

or insanity of the testator, but that the plaintiff is intitled to an immediate decree for payment of his legacy by the defendant, notwithstanding the probate of the will has not been granted (1).

(1) *Reg. Lib. B.* 1745. fol. 447.

Case 124. *The Weavers' Company qui tam* versus *Hayward*, *June* 12, 1746.

An action brought on the Callico act, in which the plaintiff served the defendant with a copy of a writ, instead of a special *capias*, and afterwards got the cursitor to alter the return of the original: the alteration is erroneous, and the writ must be superseded. S. C. cited post. 596.

THIS came on upon the motion of the Attorney General, who moved to stay proceedings upon an original writ, tested the 22d of *November*, returnable the *octave* of *St. Hilary*; the teste was within the six months, limited by 7 *Geo.* 1. *c.* 7. *sec.* 4. *the Callico* act, for the bringing of the action on that statute.

Instead of summons and *pone*, or special *capias*, which pays no stamp duty, they served the defendant with a copy of the writ, and afterwards applied to the Cursitor to alter the return of the original.

The first objection made by the defendant was, that this alteration was erroneous, and that it was of consequence to the stamp duty.

Mr. *Noel*, for the plaintiff in the original action, cited the case of *Loan* versus *Coveney* in 1738, to shew this court considered itself as an *officina brevium*, and that it would not enter into the question, whether this writ was executed or not.

Treblecock's case, *March* 23, 1736, *vid.* 1 *Tr. Atk.* 633. a *homine replegiando* issued out of this court, and was returnable in the court of King's Bench, and being returnable there, the court would not enter into the irregularity.

Philips versus *Philips*, *December* 15, 1737, there an application was made to this court for an original writ, to warrant a judgment upon the statute of bribery and corruption after a verdict, and where error was brought for want of that original; and though this case was said to be excepted out of the statute of jeofails, yet held, that though the statute of jeofails were material in applications to this court, as *an officina brevium*, the objection in point of revenue was not of weight in a mere matter of discretion, as this was, where the party would be totally deprived of his action.

Mr. *Clark* cited *Finch* upon judicial process, that where an original is returned *tardè*, an *alias* or *pluries* original will go; but if no return, then it must issue out of this court; and for this purpose mentioned *Dyer* 211.

LORD

WEAVERS' COMPANY v. HAYWARD.

LORD CHANCELLOR,

I am of opinion it ought to be superseded; I cannot quash it (1) unless error appear on the face of the writ, and then the properest way would be by plea in the court where it was returnable.

Where error appears on the face of the writ, the properest course is by plea in the court where it is returnable.

I will take up the second objection first, in order to lay it out of the case, for this is not a motion to censure the attorney, or the party, but to supersede the writ only.

If it was nothing more than an offence against the stamp act, it would be no sufficient ground to supersede the writ; the officer and party would be liable to penalties, as in the case of a deed which is not to be made use of till the duty paid, and yet it is the deed of the parties.

However I am of opinion, it is such an original writ as the stamp duties are payable on; for I understand the exception to be of such an original, as the *capias* necessarily issues on; nay, of one, on which it is at the party's election to take out a *capias*, and there the duties ought to be paid.

It was in order to preserve the jurisdiction of this court, and *the Cursitor's office*, that this exception was taken, for otherwise it would be paying double duty both on the original and *capias*.

The stamp acts did not intend to exclude all amendments of writs, for that would be grievous.

The first clause of the stamp acts relate to where another writ is written on the same piece of vellum, or parchment; and I am of opinion, that on an information, or action, it must appear to be another writ, and the other part relating to erasures refers to a fraudulent one.

If the officers of the stamp duties think this practice contrary to law, they ought to apply for a general regulation.

As to the other question, I am of opinion this writ ought not to have been so altered.

If nothing had been done on this writ it would have brought it to the question, concerning its being done by writing it over *de novo*, or by interlineation or erasure, in which practice it is admitted, that if an original writ has been executed it cannot be done.

Now what is such an execution as to prevent an alteration of it.

If it had been lying in the attorney's hands, and so in the party's power, that would be one thing. And if the service of this copy being void, is to be looked on as no service, a party may always avoid an irregular execution of his own writ, and get it altered. [364]

Suppose it had been carried to the sheriff, and he had returned it improper, would that have been an execution? To be sure it would.

(1) *Vide Woodcraft* v. *Kinaston*, *ante* 2 vol. 318.

This

Weavers' Company v. Hayward.

The copy, being an irregular service, is still an execution of the writ.

This has not been carried to the sheriff, yet this copy, though an irregular service, because not warranted by 12 *Geo.* 1. is still an execution of this writ: nay, it is actually specified in the copy what the return of this writ is, can he afterwards alter the return?

Suppose the plaintiff had declared upon this process, and had obtained judgment, all the proceedings were subject to be set aside, yet, by this doctrine, he may resort to the office for an alteration.

As to the case of *Philips* versus *Phillips*, the process was not by original, but by *capias*, and he wanted an original to warrant his judgment, and held there was no difference as to actions *qui tam*, and other actions as to this point.

There he had begun his action in time, here the plaintiff would take out an original out of time.

His Lordship directed the writ to be superseded.

Case 123. *Wheeler* versus *Bingham*, *June* 14, 1746.

2 Ves. 265. S.C. If the testator by a clause in his will, after creating a legacy, says such legacy shall go over, in case of marriage without consent, the residuum will carry it no farther, in consequence, this is not a mere in terrorem devise over, the plaintiff is entitled to the legacy (1).

"MR. *Fettiplace*, by his will, *inter alia*, gave to each of his granddaughters that should be living and unmarried at the time of his decease, on their respective days of marriage, the sum of fifteen hundred pounds, and he did desire that none of his granddaughters should marry without the consent of their father and mother, or the survivor of them; and therefore if any or either of them should marry without such consent, then by his will he revoked what was thereby directed to be paid to such granddaughter or granddaughters, and such of them should not be entitled to any benefit by virtue of such his will, any further than what their father and mother, or the survivor of them, should think, and he afterwards directs, that after the several legacies and sums directed to be paid are satisfied, and any sum of money should remain in the hands of the trustees, the survivor or survivors of them, the same should be paid to his daughter [illegible], and after her decease to the defendant *Bingham* and his heirs."

[365] The plaintiff, one of the granddaughters, has married without consent of the father and mother, and has brought her bill for the legacy.

The mother of the plaintiff has appointed trustees of the legacy for the plaintiff for her separate use for life, and to her issue, but the father [illegible] to the defendant Mr. *Bingham*.

Mr. Solicitor General for the plaintiff cited the case of *Paget* versus *Haywood* (2) *November* 1733, at the *Rolls*. Where it was held, that a general devise of the *residuum* or a devise to the person entitled to the *residuum*, were the same as if there was no devise over at all.

Mr. Attorney General for the defendant cited *Harvey* versus *Aston* (3), *Pasch.* 13 *Geo.* 2. with regard to Lord Chief Baron

(1) See the note annexed to the case of *Harvey* v. *Aston*, ante 1 vol. 361.

(2) Ante 1 vol. 78 S. C.

(3) Ante 1 vol. 361. S. C.

Comyns's

Comyns's opinion on the effect of a devise over. *Comyns's Reports* 746. and also *Eq. Caf. Abr. Amos* versus *Horner* 112. and *Creagh* versus *Wilson*, 2 *Vern.* 572. to shew that the plaintiff's wife is not intitled to the legacy of 1500*l.* under the grandfather's will.

Mr. Solicitor General in reply said, the case of *Amos* versus *Horner* was reported in no other book, and Sir *Joseph Jekyll* said in the case of *Harvey* and *Aston* he had ordered search to be made for it, but it could not be found. 1 *Ch. Caf.* 22. *Bellasis* versus *Sir William Ermin*, was determined directly contrary, and *Garret* versus *Pritty*, 2 *Vern.* 293.

Lord Chief Baron *Comyns* refers to these two cases, as having settled these distinctions uncontrovertedly.

Wherever this court exercises a jurisdiction with another court, they have adopted their rules, and never vary in their determinations from the ecclesiastical court, but where the interest of a third person is concerned.

The defendant's counsel have construed it to be the same thing under the words of the will, as if the testator had given it to the mother of the plaintiff to dispose of absolutely,

Which is by no means the case; it is only leaving it to the father and mother to give it totally or partially to such child as has married without consent.

LORD CHANCELLOR,

In the present case the direction the grandfather has given by his will, that the grandaughter should take the advice of parents was a very wise one, and what the mother has done appears [366] so reasonable, that if I could consistently with determinations of this court, and the matter was *res integra*, I would go as far as possible to support it.

But notwithstanding such inclination, I cannot hold this portion to be in the power of the mother, to be disposed of in the manner she has done, for it would shake the settled rules of the court.

The first question is, Whether this condition is an effectual condition, or *in terrorem* only.

Secondly, Whether here is that which amounts to a bequest over of the legacy.

As to the *first*, in order to prove it is a condition that ought to have it's effect, it is said by the defendant's counsel it amounts to the same thing as a condition precedent, and therefore the party claiming must shew it performed.

Two answers may be given to this.

It is clearly a personal legacy, and the personal estate is sufficient to satisfy the whole, and consequently is no charge on the real estate; it has been laid down in *Harvey* and *Aston* by Lord Chief Baron *Comyns*, that the civil law makes no difference between conditions precedent or subsequent, but hold it to be a void condition equally in both.

There have been several cases in this court of a personal legacy, where, if it has not been given over, though a condition precedent, yet it will not be effectual to defeat the legacy.

But

WHEELER v. BINGHAM.

But I take this to be a condition subsequent, for when the event happens, it is vested.

A distinction has been attempted here that the breach of the condition happening, *eo instante* the legacy vests, it is therefore void.

But though they meet together at the same time, yet they are considered in point of law as subsequent in the order of things.

It has been truly said she need not shew in the ecclesiastical court any thing but the marriage, and the objection must come from the other side, and *primâ facie* it was sufficient for her to shew the legacy, and that she is such a grandaughter as is described in the will.

Therefore I am of opinion the attempting a distinction from former cases, to make this a condition precedent, will not prevail.

[367]

But it has been said, if there is not a condition precedent, but subsequent, yet it amounts to the same thing as a devise over, by reason of the strength of evidence of the testator's intent that the legacy should cease.

I am of opinion this is not the reason that has governed the court.

There have been abundance of cases here, where the intention of the testator was full as strong that the legacy should cease, as in the case of *Garret* versus *Pritty*, and yet the intention only did not prevail.

It is the being given over, and vesting in a third person, has induced the court to suffer the condition to effectuate, and not the intention.

The true ground upon which this court has suffered the condition *to effectuate*, is not the intention, but the right of a *third person*, the being given over, and vesting in that third person, if the condition is not performed.

If that be so, the next consideration is, Whether here is in the present case what amounts to a devise over to a third person in point of right.

I am of opinion there is not.

The gift to the trustees is not of a particular fund, but of his personal estate in general: then afterwards follows, *it is my desire that none of my grandaughters should marry without the consent of the father or mother, &c.*

Then comes another clause, which says, *that after the several legacies and sums directed to be paid and satisfied, if any sum of money should remain in the hands of the trustees, &c. the same should be paid to his daughter Philadelphia for life, &c.*

Upon these two clauses, and the clause of revocation, the question of *bequest over arises.*

It has been insisted on by the counsel for the defendant, that the plaintiff not having any further benefit than what the father or mother or survivor of them should direct, amounts to a devise over.

But I am of opinion it does not.

If it had been said upon her marrying without consent, I revoke that legacy, and give the 1500*l.* to the father or mother to dispose of, it would have been a devise over: but this is only putting it in the power of father or mother, or the survivor.

vivor, to *abridge* the legacy given to the daughter, and when it should be so abridged, the remainder would have fallen into the residue. WHEELER v. BINGHAM.

The authorities are most clear in the case of *Garret* versus *Pritty*, and *Bellasis* versus *Ermin*, to this purpose. [368]

If the testator himself had abridged this legacy, it would have been no more than *in terrorem*, and consequently delegating it to another to do it will carry it no further (1).

The clause ("If any sum of money should remain in his "trustees hands, the survivors or survivor, he directs the "same should be paid to his daughter *Philadelphia* for life, "and after her decease, to the defendant *Bingham* and his "heirs") has been made use of on both sides; the first part of it by the plaintiff, and the latter by the defendant's counsel.

The words preceding, when the several legacies *shall be fully paid and satisfied*, say the plaintiff's counsel, mean, when all the sums before given shall be paid, and therefore nothing is given over till all the sums are paid.

That can never be the meaning, but what the defendant's counsel have said is the right construction, when they shall be paid *according to the directions of the will beforementioned*.

The other words made use of on the part of the defendant are, *particular declarations of particular sums of money*.

If this had been a particular fund, which is given to his trustees, as certain stocks, or certain mortgages, and the will had said, the legatee shall have no more than the father and mother should appoint, then I think it would have been a gift over of the remainder of that particular fund: but this is only a description of the *residuum* of the personal estate in the hands of his trustees.

Then the observation I have made brings it to the rules of this court; and I am of opinion an express devise, that if legatee should not perform the condition, the legacy shall sink into the *residuum* amounts to a devise over (2); but there is no such direction here, and therefore though there is nothing unreasonable in the restriction, and though what the mother has done is prudent, yet I cannot construe it to be a forfeiture of the legacy without shaking the authority of all the other cases, and consequently must decree the legacy to the plaintiff.

An express devise that if legatee should not perform the condition, the legacy shall sink into the *residuum*, amounts to a devise over, but there is no such direction here; and however prudent what the mother has done may be, I cannot construe it to be a forfeiture without shaking the authority of all the other cases.

(1) *Garret* v. *Pritty*, 2 *Vern.* 293. *Secus* if the *lesser* legacy is to vest upon a condition *precedent*. *Creagh* v. *Wilson*, 2 *Vern.* 572. *Gillet* v. *Wray*, 1 P. W. 284.

(2) See *Amos* v *Horner*, 1 *Eq. Ca. Ab.* 112. *pl.* 9. *Scott* v. *Tyler*, 2 *Bro. Chan. Rep.* 431.

Case 124. *Snelson* versus *Corbet and Delves*, *June* 16, 1746.

B. by his will says, all my freehold of any kind or nature whatsoever, which at present is in my power to dispose of, I give to my wife. Lord *Hardwicke* thinking it a point of some difficulty, directed a case to be made for the opinion of the court of King's Bench.

SIR *Brian Broughton* by his will says, all my freehold of any kind or nature whatsoever, which at present is in my power to dispose of, I give to my wife.

The question was, what interest passed to the wife, whether for life or in fee?

The testator was seised of a freehold estate in fee, and likewise of a reversionary estate in fee, and of a copyhold estate.

Mr. *Willraham*, for the defendant the devisee, insisted the words carried the fee, and cited 1 *Lutw.* 764. and *Ibbetson* versus *Beckwith*, *Cas. in Chan. in Lord Talbot's time*, 157.

Lord Chancellor directed a case to be made for the opinion of the court of King's Bench, for, he said, it was hardly to be presumed the testator intended to give the reversion of this great estate to his wife.

There was a question likewise in the cause as to *paraphernalia*, whether it shall be liable to the payment of simple contract creditors and legatees.

Where the personal estate has been exhausted in payment of specialty creditors, the widow shall stand in their place, as to the amount of her *paraphernalia*, upon the real assets of the heir at law.

LORD CHANCELLOR,

At law, where the husband dies indebted, the widow cannot have her *paraphernalia*; but this court does not determine so strictly, for if the personal estate has been exhausted in payment of specialty creditors, she shall stand in their place as to so much upon the real assets of the heir at law (1), for she has a prior right, and a superior one to legatees, who take only from the bounty of the testator.

The personal estate must be applied in payment of debts, legacies and funerals, in a course of administration; he directed, in case the personal estate, or any part, has been exhausted by specialty creditors, then the simple contract creditors to stand in their place, to receive a satisfaction *pro tanto* out of testator's real estate; and declared that the plate which belonged to Sir *Bryan Broughton*, and which is given to the son after the death of the widow, is to be considered as part of his personal estate.

Paraphernalia shall be applied towards satisfaction of simple contract creditors, but is not liable to satisfy the testator's legacies (2).

[*310]

*He declared also, that in case the simple contract creditors of the testator shall not receive a satisfaction for their debts out of the personal estate, or out of his real estate, by standing in the place of specialty creditors in manner before directed, then the *paraphernalia* claimed by the defendant, or so much thereof as will make good the deficiency, shall be applied towards satisfaction of the simple contract creditors, but that the *paraphernalia* will not be liable to satisfy testator's legacies, or any of them.

(1) *Tipping* v. *Tipping*, 1 P. W. 729. *Tynt* v. *Tynt*, 2 P. W. 544. *Northey* v. *Northey*, 2 vol. 77. *Townsend* v. *Windham*, *Post*. 7. So where there is a trust created for payment of debts. *Incledon* v. *Northcote*, post. 438.

(2) *Tipping* v. *Tipping*, 1 P. W. 730. *Graham* v. *Londonderry*, post. 395.

Sir

SKELSON v. CORBET.

Sir *Brian Broughton* by his will devises all *his plate* to his wife, and by his codicil he only gives the use of his *houshold goods* to her for life.

LORD CHANCELLOR,

If he had given by his will all his houshold goods and plate, I should have had some difficulty, but the question now is, whether he meant to include plate in the words *houshold goods*.

There is evidence of the plate being used in the testator's house; and I am of opinion therefore houshold goods does include plate, and that after the death of the wife it passes to the son.

Plate will pass by a devise of houshold goods (1).

(1) So *Elliott* v *Compton* 2 *Vern* 638 *Amb* 605. *Contra Jesson* v. *Essington*. *Mason* v *Mason*, 1 P W 425. *Nicholls* *Prec. Cha.* 207. v *Osborn*, 2 P. W. 420. *Kelly* v. *Powlet*,

Goodwin versus *Goodwin and others*, *July* 3, 1746. Case 125.

ONE question in the cause arose upon the will of *Henry Framingham*, dated *September* 1, 1701.

"My estate in *Norfolk*, after the decease of my wife, I give "and bequeath unto *Joan Seaman*, wife of *Peter Seaman*, for her "life, and afterwards I give it to her children, to be equally "divided amongst them share and share alike; and for want of "such children I give it all to my right heir on the side of the "*Framinghams*."

After a cause is set down, you can only amend by making parties, and cannot introduce new charges, or put a material fact in issue, which was not so in the cause before, but should have preferred a supplemental bill in this respect.

One child of *Joan Seaman* was born in the life-time of *Framingham* the testator, and two others were born after his death.

Mr. Solicitor General insisted on the authority of *Wild*'s case, 6 *Co.* 16. *b.* and *Stanley* v. *Baker*, *Moor* 220. that these two children, tho' not *in rerum natura*, yet took an estate for life in remainder, but not in fee, because there is an express limitation to the right heir of the side of the *Framinghams*. (1).

An objection was taken by the counsel of *Nelthorp*, a defendant in the cause, of irregularity, for that the plaintiffs after publication past, and the cause set down, amended their bill, by insisting on this right as children of Lady *Joan Seaman*, under the will of *Framingham*.

LORD CHANCELLOR, [371]

After publication past, and the cause set down, you can only amend by making parties, and cannot introduce new charges, or put a material fact in issue, which was not so in the cause before, but should have preferred a supplemental bill in this respect and as they have not amended defendant *Nelthorp*'s copy as to this fact, it is irregular, and as this is the most intangled cause I ever saw, I will not determine it without having the

(1) It was afterwards determined that the children took only estates to their lives as tenants in common, with a remainder to the right heir on the side of the *Framinghams*. S. C. 1 *Vef.* 226.

Goodwin v. Goodwin.

fundamental point, the construction of *Framingham's* will, properly in issue before me.

His Lordship ordered it to stand over, and the plaintiff to be at liberty to bring the will of *Henry Framingham* regularly before the court, by supplemental bill, or otherwise, as they shall be advised.

Case 126. *Hart* versus *Middlehurst*, *July* 4, 1746.

The bill was brought by the daughter and only child of the first marriage of *J. M.* for a specific performance of articles previous thereto, insisting she ought to be tenant in tail of the lands therein mentioned. *Issue in the articles means female as well as male, and consequently the plaintiff is intitled to have a settlement of these lands in tail, and when the defendant the son of the second marriage comes of age, he must convey to her* (2).

BY articles of agreement bearing date the 9th of *September* 1719, upon the marriage of *John Middlehurst* with *Mary Bagley*, in consideration of a portion of two hundred pounds, *John Middlehurst* covenants with *Mary's* father to convey the lands then in his possession to trustees, in trust for *John Middlehurst* during his life, *sans waste*, and afterwards to the use of *Mary* during so long as she shall happen to live; and after the determination of these estates, *then to the issue* (1) *of this match in such sort, manner and form, and subject to such charges for younger children, as John Middlehurst shall hereafter by deed or will order, bequeath and appoint*. And lastly, *it is hereby mutually agreed by and between the parties, that all further needful and necessary covenants, provisoes, limitations and agreements whatsoever, for the further and better explaining, settling and assuring of all the premisses and estates for the uses aforesaid, or such other as shall be agreed on by all the parties to be more necessary, shall be contained in the intended conveyances.*

By a settlement made in 1722, said to be in pursuance of articles, *John Middlehurst* settled the estate to himself for life, to the wife for life, to trustees to preserve contingent remainders, then to trustees for a term of years, then to first and every other son in tail, the term to raise 600*l.* in the first place to pay his debts, and the remainder to be equally divided among the children of the marriage, in such proportions as *John Middlehurst* should by deed in his life-time, or will at his death, appoint.

In 1728, *John Middlehurst* suffered a recovery, and gained the fee of this estate, and by the recovery settled it to himself for [372] life, remainder to trustees to preserve contingent remainders, remainder to them for 500 years, remainder to his first and every other son in tail male, the trust of the term declared to be for younger children; and therein also was contained a power for *John Middlehurst* to settle a rent-charge of 20*l.* *per ann.* on any wife he might hereafter marry.

In the *May* following he married a second wife, and by settlement on that marriage, recites the deed to lead the uses of the recovery: The second wife had no notice either of the ar-

(1) [illegible] word *issue* is omitted in the [illegible]er's book; probably by mistake. [illegible] words there are, "*then to the use of the intended marriage.*" &c.

(2) See Mr. *Cox's* note to *West* v. *Erissey*, 2 P. W. 356. and the note to *Goring* v. *Nash*, ante 186.

 ticles

ticles in 1719, or settlement in 1722, and the very same estate is limited to her and the issue of that marriage, and the defendant *Middlehurst* is the son of that marriage. HART v. MIDDLEHURST.

The bill was brought by the plaintiff, the daughter and only child of the first marriage, for a specific performance of the articles, and insisted she ought to be tenant in tail of these lands, or if not, that the recovery lets in the charge in the articles upon the land.

Mr. Attorney General for the plaintiff cited the case of *Hanbury* versus *Hanbury* the 24th of *April* 1735 before Lord *Talbot*, to shew the liberal construction of marriage articles in favour of the issue.

Mr. *Sambourne* of the same side cited *Roundhill* versus *Bicrely*, 2 *Vern.* 482. to shew that a covenant to settle lands, though no particular lands are mentioned in the articles, will be a lien on the lands whereof the father was then seised.

Mr. *Brown* for the defendant.

First, Whether these articles have been reasonably carried into execution.

Secondly, Whether the plaintiff has a right to be relieved against the son of the second marriage, who has indisputably the legal estate in him, or whether she ought not to be contented with a suitable provision out of this estate.

The father of the husband had no knowledge of the first marriage, and was tenant for life of the greatest part of the estate, and did not die till 1727.

The articles are of a very great latitude, and seem to intend to give as great a power to the husband over this estate as could be.

That this is not to be considered as a strict agreement to settle it on the father for life, and if no sons, then on daughters in tail, but was intended only to secure to the younger children a reasonable provision out of the estate of the father, and to be answered by pecuniary portions. [373]

One hundred and sixty pounds he had with his second wife.

The son of the marriage, if this is determined against him, will be undone, for there is a mortage for nine hundred pounds, and the whole estate which passed by the recovery in 1722, is but eighty pounds a year, and only twenty-five pounds a year, was settled by the articles; for the father of *John Middlehurst* had at that time the power over the rest of the estate.

Mr. *Willbraham* of the same side.

The mortgage was made in 1738, since the death of *John Middlehurst*, by his executors and trustees to pay his debts.

In *Powell* versus *Price*, 2 *P. Wms.* 535. There, after a remainder to the heirs male of the body of the husband by any wife, was a remainder to the heirs of the body by the first wife, an only a daughter of that marriage; in the settlement there was a provision for this daughter; and it was held the recovery barred the entail to daughters.

HART v MIDDLEHURST.

He mentioned the rule with regard to copyhold estates, where if any heir at law is totally disinherited, the court will not decree a provision made by the father for younger children, where there was no surrender to the uses of the will.

Here the heir at law will be totally disinherited, who has indisputably the legal right, and for the benefit too of a person who has a dormant equity only under articles, of which the defendant's mother had no notice at the time of the marriage.

LORD CHANCELLOR,

In the settlement upon the recovery was compris'd the rest of the estate which came to *John Middlehurst* on the death of his father, amounting to sixty-five pound *per annum* more.

The first question will be, What is the true and proper construction of the articles?

Secondly, Whether the articles are properly carried into execution by any subsequent settlement?

Thirdly, If not, whether the plaintiff is entitled to have these articles carried into execution in the extent pray'd by the bill?

[374] The plaintiff insists she is intitled to have the whole estate settled for her benefit.

The defendant contends it is sufficient, if she has a reasonable provision [illegible] out of the estate, [illegible] which has been provided for by the father's second settlement.

But I must take the articles as they are, and the plain meaning of the words.

I am of opinion it was the intention of the parties the issue, whether male or female, should have the whole of this estate amongst them.

The father about [illegible] received six hundred pounds [illegible] the [illegible] of the first marriage, and therefore what [illegible] is not disproportionate to the fortune.

What are the words of the articles?

To convey this estate to the uses [illegible], and after the determination of those uses, then to the use of the issue, &c. (*read the words*.)

What does *issue* of the marriage mean?

Issue female, as well as male, and therefore if it had gone no farther than to the issue of the marriage, and a bill had been brought for carrying the articles into execution, the settlement must have been to all the issue, to the eldest and other sons, and for default of such issue to the daughters, with proper remainders following one after another.

When [illegible] words [illegible] issue [illegible] of the marriage, [illegible] bill brought for carrying articles into execution, how frequently [illegible] the settlement [illegible] *Wilbraham*, to the first and other sons, [illegible] to the daughters with proper remainders following one another.

I have known several decrees of this kind upon the words, *issue* of the marriage.

But then the other subsequent words, *in such sort, manner and form, and subject to such charges for younger children as John Middlehurst shall hereafter by deed or will order, limit and appoint*, are relied on by the defendant; and it has been insisted that this leaves a power in the father, as to the manner and quantity of interest, the children shall take out of the estate.

I agree it does as to the manner, but not as to the interest. HART v. MID-DLEHURST.

To be sure the father might have divided the estate amongst the children, a different part among the sons if he pleased, and another part by way of provision for the daughters: But still the whole of the estate must have been divided, though the proportion was left to the father.

But it has been said, if there was a sole daughter of the first mariage only, he might limit the estate to the sons of the second marriage, upon leaving a charge for the benefit of the daughter of the first marriage. [375]

The cases which have been cited do by no means come up to the present.

For upon the original construction of the articles, where the thing is open to the court, it is too much to say that *an eldest and only child* shall be considered as a younger by the court.

Another objection has been started, that this construction is contrary to the usual course of marriage settlements; for it is not customary to limit to the daughters, without an intervening limitation to the father in tail, so as to put it in his power to postpone daughters of a *first*, to sons of a *second* marriage.

I allow this to be the most prudent way, and the articles in the case of *West* versus *Erisey*, in 2 *P. Wms.* 349. was in this manner, and decreed to be carried into strict settlement; but there was a settlement of the whole estate, here there is no intervening limitation to the father in tail, and 25 *l. per ann.* at most, is the estate comprised in the articles.

The second question is, whether the articles are properly carried into execution by any subsequent settlement.

I am of opinion they have not been properly carried into execution.

There are two settlements, one of the 18th of *April* 1722.

There is no colour to say this is in pursuance of the articles.

The next settlement is dated the 12th of *March*, 1728, upon which a common recovery was suffered after the death of the first wife.

Most clearly this is no performance of the articles, for there is no certain provision for daughters, though it comprehended the whole of his estate.

After this he intermarried with a second wife in *May* 1728.

I am of opinion there is no reasonable performance of articles in either of these settlements.

The third question is, whether the plaintiff has a right to have these articles carried into execution in the extent prayed by the bill.

I am of opinion the plaintiff has a right.

Take it as it stood originally, if the construction I have put upon these articles be right, then to be sure this was the original right for the plaintiff to have a specific performance from the general nature of the thing. [376]

Some bars have been set up against it.

HART v. MIDDLEHURST.

The *first* thing insisted on was, that *John Middlehurst* the father of the plaintiff was only a tenant in tail at the time of the articles, and that if he had continued so, this estate would have gone over to the son as heir in tail.

But then the answer is, *John Middlehurst* suffered a common recovery, and the consequence of that is, it let in a prior charge and incumbrance, which he had thought fit to lay upon it (1).

Though the counsel for the defendant have attempted to make a difference between a legal and equitable charge upon an estate, I think there is none.

In the first place, what is the reason the recovery by tenant in tail lets in his legal charges? because the tenant in tail is considered as owner of the estate.

Some books say, common recoveries are impliedly excepted out of the statute *de donis*.

Common recoveries deliver the estate from the fetters and trammels imposed upon it by the statute *de donis*, and that was the opinion in Lord *Derwentwater*'s case, *Hil.* 5 *Geo.* 1. *Modern Cases in Law and Equity*, 2 *part*, *p.* 172. 3 *vol. of New Abr. of the Law*. 796.

If tenant in tail confess a judgment, &c. and suffer a recovery to any collateral purpose, that recovery shall enure to make good all his precedent incumbrances.

All the uses declared by this conveyance are derived out of the estate of *tenant in tail*, and as it was his old estate, it is reasonable it should let in this charge. In *Goddard* versus *Complin*, 1 *Ch. Cas.* 120. it was declared, "that if tenant in tail confess a "judgment, &c. and suffer a recovery to any collateral purpose, "that recovery shall enure to make good all his precedent acts and "and incumbrances" (2).

Tho' a conusee of a judgment has neither the legal estate, nor a legal lien, yet a common recovery will let in this judgment.

Has a conusee of a judgment any estate in the lands? None at all, neither legal estate, nor legal lien, and yet when a common recovery is suffered it lets in this judgment.

A common recovery will let in a charge under marriage-articles and whether it is a legal or equitable estate it makes no difference.

* It would be a most absurd thing to say, a common recovery suffered by a tenant in tail should let in his lease, should let in a prior judgment, and yet not let in a charge under marriage-articles, and therefore there is no difference between a legal and equitable estate.

[*377]

Another objection was, that the defendant ought to be considered as a purchaser for a valuable consideration without notice of these articles, and therefore ought not to be affected by it; that undoubtedly the mother was so, and if she had been living, could not have been hurt, and that the recovery and settlement in 1728, were in contemplation of the second marriage, and extended further; that this marriage was had, and portion paid upon the credit of this settlement, and that her son will be intitled to the uses under this settlement.

(1) *Vide Cruise, Rec.* 284. (2) *Vide Goodright* dem. *Tyrrel* v. *Mead*, 3 *Burr.* 1703.

Take

HART v. MIDDLEHURST.

Take it by steps.

If the mother, the wife of the second marriage, had been before the court, I do admit she ought to have been considered as a purchaser for a valuable consideration: and it cannot be doubted where a power is executed under a voluntary settlement, if that power is afterwards executed for a valuable consideration, without notice to the person who takes under that power, then she shall have the benefit of it. (1).

But the second wife is dead, and her jointure is determined.

Next as to the son. The only proof was, that during the courtship with the last wife, she desired the witness to advise her about the matter of the marriage, who swears he does not believe she had notice of the articles.

This does not at all prove that there was any agreement for making the settlement in 1728, or that it was in contemplation of the marriage, neither is it consistent with the uses of the deed itself.

Then the whole of the defence is, that this marriage was had on the credit of this settlement.

I think so far the evidence does go, that the settlement in 1728, was produced to the friends of the wife, and that this was the grounds of the marriage, then the question will be, Whether that will make the son a purchaser for a valuable consideration.

Whoever will make himself a purchaser for a valuable consideration, must take by contract, and under an actual conveyance (2).

The case of *Fitzgerald* and *Lord Falconbridge*, in *Fitzg. Rep.* 207. is a case in point; nay a stronger case, for it was said by the court there, whoever will make himself a purchaser for a valuable consideration, must take by contract, and under an actual conveyance.

There was no contract to support this consideration, and the issue of the marriage were to take their chance.

[378]

Consider how it operates upon the present case; there is no recital here in the deed for settling a jointure on the wife, or that the wife's portion was, in consideration of the estate settled upon the sons of the marriage.

Shewing a settlement to parties before marriage, and their relying upon the credit of it, will not make the issue of the marriage puchasers.

It would be extremely dangerous to say, that the shewing a settlement to parties before marriage, and their relying upon the credit of it, will make the issue of that marriage purchasers for a valuable consideration.

But that is quite different from the doctrine of the court in *Fitzgerald* and Lord *Falconbridge*, which was determined by the House of Lords, and the court must take things as they find them; and consequently the plaintiff is intitled to have a settlement of the estate in tail, and must hold and enjoy till the defendant comes of age, and then he must convey; and therefore his Lordship decreed the plaintiff was intitled to a specific performance of the articles in 1719 (3).

(1) *Warrick* v. *Warrick*, *ante* 291, 571. *Goring* v. *Nash*, *ante* 188. *note*. 293.

(2) See *Bramlyn* v. *Ord*, *ante* 1 vol.

(3) *Reg. Lib.* A. 1745. fol. 520.

Case 126. *Smith* versus *Cooke*, *July* 14, 1746.

S. who was tenant in tail of the estate in question, lets a lease of it in 1741 to the plaintiff his son, who was to enjoy it at the rent of 25*l.* *per ann.* the father was an insolvent debtor, and in *Octo.* 1743, was discharged under 16 *Geo.* 2: the bill is brought against the defendant for an account of profits, and of timber felled: *The plaintiffs intitled to such account from the time only of the father's discharge, for they could have no right till their title to the estate accrued.*

THE father of the defendant, who was tenant in tail of the estate in question (1), lets a lease of it in 1741 to his son, who was to enjoy it at the rent of 25*l.* *per annum*, and who covenanted to maintain his mother, and to pay the land tax.

The father being an insolvent debtor, was cited by one of his creditors, to deliver in a schedule of his estate and effects according to the form of the act of parliament in the 16th year of *George* the Second, and in *October*, 1743, the father of the defendant was discharged under this act.

The bill is brought against the defendant, for an account of profits, and of timber felled.

LORD CHANCELLOR,

I am of opinion the plaintiffs are intitled to it from the time of the discharge of the father, the insolvent debtor, but not before, for they could have no right till their title to the estate accrued, which was not till *October*, 1743.

[379] As to the lease in 1741, no body can say it was made fraudulently, either upon the act of parliament, or against this particular set of creditors; for the covenant by the son to pay the land-tax is not an unreasonable thing, nor was the covenant so to maintain the mother, who appears to be a lunatick, and wanting such care and support, and therefore upon the foot of the father's contract, I am of opinion, the plaintiffs are not intitled to an account from the time the son entered into possession, by virtue of this lease.

But the material question is, Whether this estate vested in the assignee of the insolvent debtor by virtue of the compulsory clause in this act.

(1) The estate was limited "to the father for life, *remainder to the wife for life, remainder to the heirs of their bodies*, remainder to the father in fee." Thus it is stated in the Register's book: but in all probability this statement is wrong; for by the above limitations the husband and wife would have had a joint estate tail subsequent to the estate for life given to each, and in order to bar this joint estate tail, it would have been necessary for the wife as well as the husband to have joined in a fine, or have been vouched in a common recovery. The assignees therefore under the 16 *Geo.* 2. could not be entitled to such an estate tail, because to give a title to them the insolvent debtor should, I apprehend, be seised of an estate tail, which he could alone bar by fine or recovery: neither could such joint estate tail be conveyed by commissioners in a bankruptcy by virtue of the *Stat.* 21 *Jac.* 1. *c.* 19.

The

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The defendant insisted, that as his father was cited in by a creditor, and did not himself claim the benefit of the act, the estate-tail did not vest in the assignee.

Though the father, when cited in by the creditor, did not claim this estate-tail, it vested equally in the assignee as if the father had done it, and if I had any doubt, would have ordered a case for the opinion of the judges.

I am of opinion it did vest in the assignee equally as if the insolvent debtor had claimed it himself, and if I had any doubt, would have made a case for the opinion of the judges, but I have none.

It is a most just clause, and almost a reproach to former acts of parliament, that it was not inserted in them; before this, a debtor would lie in gaol four or five years, and waste his substance, and, if his conscience would digest it, by his oath get discharged under an act for relief of insolvent debtors.

The creditor had no remedy, could not go to a justice of peace and desire the debtor might deliver up his effects, and let him be discharged upon so doing.

Whether the clause in this act is so penned as to obtain that end, is another consideration.

The general words in the first clause take in estates tail.

The great objection arises on the words in the 32d clause; "Whereas it may happen, that several persons, *who may claim* "*and be intitled* to the benefit of this act, are seised of an estate "tail in any freehold or copyhold lands, &c. Be it enacted, "that in every such case, such person or persons so seised as "aforesaid, *and who shall be intitled unto and claim* the benefit of "this act, shall, to all intents and purposes whatsoever, in "law be deemed and taken, and is and are hereby declared to "be seised of such lands in fee-simple."

It has been said that this clause relating to estates-tail, is confined to such persons as may claim or are entitled to the benefit of this act, and that the claim is by the voluntary petition of the debtor himself. [380]

The foundation for the relief given by this act was, that it would be no prejudice to a third person; for whatever property a man had, which he could by any conveyance dispose of, it was but just his creditors should have the benefit, as of an estate-tail for instance by a recovery, and therefore the legislature thought it just that an estate-tail should be for their benefit.

Where is the difference, if a creditor is obstinate, and thinks fit to lie in gaol, and not apply for the benefit of the act, and his creditors apply for him?

"And whereas several persons who are prisoners for debt, "chose rather to continue in prison, and spend their substance "there, than discover, and *deliver up* to their creditors, their "estate and effects, in order to the satisfaction of their "just debts. &c. such prisoner shall, before the justices at the "quarter sessions, at the desire of one or more of his cre-"ditors, be obliged to deliver in upon oath, and subscribe the "like schedule of his estate and effects, *to be vested, assigned, and*

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"*equally divided*, for the benefit of his creditors, *&c.*" clause the 37th.

What is the meaning of *deliver up*?

Why, that he ſhall make a ſchedule of his eſtate and effects.

It was ſaid for the defendant, that the act meant he ſhall deliver up *in like form.*

But, I am of opinion, the act did not mean he ſhould deliver up in like form, but in ſubſtance the ſame.

Then to what intent?

To be veſted, aſſigned, and equally divided.

Where an inſolvent perſon is ſeiſed of a remainder in tail, reverſion in fee in himſelf, with an eſtate for life in a ſtranger, he will be obliged to inſert this in his ſchedule.

Suppoſe the inſolvent perſon was ſeiſed of a remainder in tail, reverſion in fee in himſelf, with an eſtate for life in a ſtranger, he would be obliged to inſert this in his ſchedule; if this was not to be the conſtruction, the act would do more hurt than good, and it ought to be expunged in the next act.

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The intent of the act is to make the remedy to the creditor equal and co-extenſive, for the words are relative to all former deſcriptions under other act

Upon the whole of this clauſe, I am of opinion, the intent of the act is to make the remedy to the creditor equal and co-extenſive, for the words, though ſhort, are relative to all former deſcriptions under other acts.

The inſolvent debtor ſtatutes are equally compulſory on the debtor with the ſtatutes which relate to bankrupts, for it would be pernicious to make any difference between creditors.

The ſtatutes relating to bankruptcy are all *compulſory*; there is no reaſon, in point of juſtice, to exempt debtors under theſe acts of parliament, but they ought to be equally *compulſory*; it would make ſtrange work to ſay there was any difference between creditors.

"And if any *ſuch priſoner, ſo brought up as aforeſaid*, ſhall neglect or refuſe to deliver in and ſubſcribe ſuch ſchedule within "ſixty days, he, ſhe, or they, ſo neglecting or refuſing, ſhall "upon conviction thereof be adjudged guilty of felony, and ſhall "ſuffer death as a felon without benefit of clergy;" the laſt part of the 37th clauſe.

Such priſoner, ſo brought up as aforeſaid, is the perſon claiming, and intitled to the benefit of this act.

Upon the whole of this clauſe, the intention is to make debtors' eſtates liable in the one caſe, juſt as they would have been in the other.

If a debtor claim the benefit of this act *after his diſcharge*, it is equally within the meaning, as if he had claimed *a parte ante* his diſcharge, and may as properly be ſaid to claim, and be intitled.

I am of opinion clearly, the aſſignee is intitled to the remainder in tail.

The next queſtion is, Whether he has a right to an account of timber felled?

As he is intitled to the eſtate, conſequently he is intitled to the timber.

But

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But then, it is said, they must take their remedy at law.

After the estate of the lessee is determined, and a new lessee is in possession, a person, merely for an account of timber felled by way of wrong, could not come into a court of equity (1).

But where the person continues in possession, and consequently in a condition of committing more waste, there a person is proper to come into equity for an injunction to stay waste: And though the plaintiffs have not actually moved for an injunction, they might reserve that relief till the hearing of the cause, if they thought proper, and I am of opinion it is incident to their estate, and they are intitled to an account for such waste. [382]

There are a great many cases where a remainder-man in tail, or a reversioner in fee, may come into this court to have the title deeds secured for their benefit, though an estate for life is standing out (2); and I do not see why the plaintiffs here may not as well come into this court, to pray a sale of the estate, and it has been done under commissions of bankruptcy.

A remainder-man in tail, or a reversion in fee, may come into this court to have the title deeds secured for their benefit, though an estate for life is standing out; and the plaintiffs in this case may equally come here to pray a sale of the estate.

Upon the whole I am of opinion, the plaintiffs are proper in their remedy, and proper in their right.

"And declare that the plaintiffs, as assignees of the estate and "effects of *John Cooke*, under the 16th of the present King, for "the relief of insolvent debtors, are intitled by virtue of that act "to have the remainder of the estate in question, which was "vested in *John Cooke*, to be applied towards payment of the "debts of the creditors; but the defendant *John Cooke*, the eldest son and heir of *John Cooke* the insolvent debtor, now present in court, offering to pay off all such debts of his father as "remain due and unsatisfied, together with the costs of the execution of the trust; I order that it be referred to Master *Holford*, to take an account of all the debts at and before the time "of his discharge, and of the plaintiffs' expences in the execution of the trust, and to tax their costs of this suit, and all the "creditors are to come in before the Master, and prove their "debts within a time to be limited for that purpose, or in default thereof, they are to be excluded the benefit of this decree: and I decree that the defendant *John Cooke* do, pursuant "to his submission, pay to the plaintiffs the surplus of what shall "be found due for such debts, which shall not be satisfied by "the application of the estate and effects of *John Cooke*, together "with what shall be found due to the plaintiffs for the expences "of the execution of the trust, and for their costs of "this suit; and upon such payment, I do order that the "plaintiffs convey all their estate, right, title, and interest, "in the premisses in question, to such person as shall be appointed by the defendant *John Cooke*, and this decree to be "without prejudice to any question that may arise between the

(1) *Jesus College* v. *Bloome*, *ante* 262. *Pyncent* v. *Pyncent*, *post*. 571.
(2) *Vide Ivie* v. *Ivie*, *ante* 1 vol. 431.

"defendant

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"defendant *John Cook*, as issue in tail, or heir at law of his fa-"ther, and the representatives of his father's personal "estate"(1).

(1) *Reg. Lib. B.* 1745 fol 482.

Case 127. *Buxton* versus *Lister* and *Cooper*, *July* 15, 1746.

[383]

In general the court will not entertain a bill for a specific performance of contracts for chattels, or which relate to merchandise, but leave it to law, where the remedy is more expeditious; but, in the present case the agreement not being final, but to be made complete by further act, a bill to carry it into execution will be allowed.

THE defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing: and on the first of *November*, 1744, the following memorandum was signed by the parties.

"*Matthew Lister* and *John Cooper* have agreed with *Joseph* "*Buxton* for the purchase of all those several large parcels of "wood, consisting of oaks, ashes, elms, and asps, which are "numbered, figured, and cyphered, standing and being within "the township of *Kirkby*, for the sum of 3050 *l.* to be paid at "six several payments, every *Lady day* for the six following "years; and *Lister* and *Cooper* to have eight years for disposing "of the same; and that articles of agreement shall be drawn "and perfected as soon as conveniently can be, with all the "usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

Lord Chancellor, upon the opening, said, he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir *Joseph Jekyll* did, in *Cud* versus *Rutter*, 1 *P. Wms.* 570. decree a specific performance in the case of a chattel, but Lord *Macclesfield* reversed it, and it has been the rule of the court ever since, not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

The defendants' counsel, to shew the impropriety of such a bill, and that the parties ought to be left to law, cited *Roll's Reports* 493. and *Latch's* 172.

Upon hearing what the plaintiff's counsel could alledge, in order to take this case out of the general rule of the court, *Lord Chancellor* delivered his opinion as follows:

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones. Buxton v. Lister.

First, Whether the plaintiff is intitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether, as to the merits of his case, he is intitled to such a decree.

As to the first, I am of opinion, that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c. (1). for as those are contracts which relate to merchandize, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above *a shilling* damage.

Therefore the court have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature, and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithstanding this general distinction between personal contracts, and for goods, and contracts for lands, yet there are indeed some cases where persons may come into this court though merely personal, and the plaintiff's counsel have cited a case in point, *Taylor* versus *Neville* (2).

That was for a performance of articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by installments, and a specific performance was decreed.

Such sort of contracts as these, differ from those that are immediately to be executed.

There are several circumstances which may concur. [385]

A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case, but the performance of the contract in *specie*.

In the case of *John* Duke of *Buckinghamshire* v. *Ward*, a bill was brought for a specific performance of a lease relating to *Allum* Works,

(1) So *Cudd* v. *Rutter*, 1 *P. W.* 570. *Capper* v. *Harris*, *Bunb.* 135.

(2) *Vide Colt* v. *Netterville*, 2 *P. W.* 304. *Thompson* v. *Harcourt*, 2 *Bro. Parl. Ca.* 415.

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Woods, and the trade thereof, which would be greatly damaged, if the covenant was not performed on the part of *Ward*.

The covenantee might have recovered damages, and yet the court considered if they did not make such a decree, an action afterwards would not answer the justice of the case, and therefore decreed a specific performance.

There is another thing of the like kind, the memorandum appears not to be the entire contract, but is to be made complete by subsequent articles.

It is doubtful, whether at law the plaintiff would not have been told this was an incomplete agreement.

Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and there should be specified in the memorandum, that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off, I should be of opinion, upon a bill brought by the other in this court, for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.

The court ought to weigh with great nicety cases of this kind, before they determine the bill proper, where it is a mere personal chattel.

On the circumstances of the present case, such a bill ought to be entertained, but at the same time I will add that courts ought to weigh with great nicety cases of this kind, before they determine the bill proper, where it is a mere personal chattel.

Secondly, If the plaintiff on the merits of the case is intitled to a decree.

Every agreement of this kind ought to be certain, fair, and just in all its parts, or this court will not decree a specific performance.

Nothing is more established in this court, than that every agreement of this kind ought to be certain, fair, and just in all its parts.

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If any of those ingredients are wanting in the case, this court will not decree a specific performance.

For it is in the discretion of the court, whether they will decree a specific performance, because otherwise, as I said before, a decree might be made which would tend to the ruin of one party.

One objection made by the defendant's counsel to the decreeing a specific performance was *misrepresentation*.

This depends upon the evidence of *John Cooper*, son of the defendant *Cooper*, that his father offered the plaintiff 2800 *l.* he insisted upon 3000 *l.* and said *Ironmonger* and *Clark*, two timber merchants, had valued it at so much, and that this was true upon his honour, upon which as he said a thing on his honour, the defendant could not but believe it.

All ... the defendants agreed to give 2050 *l.* for the ... upon the opinion they had of *Ironmonger* and *Clark's* judgment.

If

If this be true, it is an ingredient which will induce a court of equity not to decree a specific performance, for it comes out now that *Fenwick and Carter did not set any greater valuation than 2500l. upon the timber, and this misrepresentation* was the ground which induced the defendants to come into the agreement. BUXTON v. LISTER.

This fact is very particularly put in issue, and yet the plaintiff, who examined *Oley and his wife* that were present when this discourse passed, do not ask them as to this fact.

There is nothing inconsistent therefore in their deposition from *Cooper's*.

The next point is, as to the preparation of the articles.

Whether there are defects or omissions which ought to have been inserted.

It has been insisted by the defendants, that they would have had the usual clause inserted in the articles relating to the buyer's horses being permitted to graze on the land, where the timber stands, and likewise would had a covenant, for indemnifying the defendants in falling the timber, because, as it grows in hedge-rows, one side belongs to a stranger, but the plaintiff refused it.

Therefore, if it is most natural to suppose it would fall on that side, the defendants ought to have been indemnified from actions which might have been brought for a trespass on the stranger's land. [387]

But then the counsel differ as to the consequences.

The plaintiff insist, the articles ought to be sent to the Master, to see if there are usual covenants.

In case of land the plaintiff's counsel would have been right.

But a personal contract is quite different, because, when the defendants saw that the plaintiff would not insert these covenants, they had no occasion to wait the event of a Chancery suit, but might go to another market to supply themselves.

Upon the whole, I am of opinion the bill must be dismissed, and if it was to be dismissed upon *the misrepresentation* it ought to be with costs: but what I would propose is, that if the plaintiff will consent to give up the agreement, I will dismiss it without costs; but if he will bring an action, then with costs.

The plaintiff waving the agreement, his Lordship decreed accordingly.

Berney versus *Eyre*, *July* 22, 1746. Case 128.

THE only material question upon the rehearing was, whether the heir at law is intitled to costs.

Where a devisee brings a bill merely *in perpetuam rei memoriam*, and the heir at law only cross examines the witnesses, he is intitled to his costs, but if he contests the will he shall not.

Lord *Hardwicke* laid down the following general rules:

That if a devisee brings a bill merely *in perpetuam rei memoriam*, and the heir at law does nothing more than cross examine the

[illegible] v. [illegible]. witnesses, who are produced to confirm the will he is intitled to his costs (1).

If he examines witnesses to encounter the will, then he shall not have his costs.

This is, where the bill does not pray relief, or is not brought to a hearing.

As an heir has a right to be satisfied how he is disinherited, though he has an issue directed to try it, and the will is established, yet he shall have his costs.

But when the cause is brought to a hearing, if the heir at law has an issue directed to try the will, and the will is established, as he has a right to be satisfied how he is disinherited, he shall have his costs.

If the heir sets up a disability against the person who made the will, and fails, he shall not have his costs.

* If he sets up insanity, or any other disability against the person who made the will, and fails, he shall not have his costs (2.)

The court will give costs against an heir in a case of spoliation or secreting of a will.

But it must be a very strong case, which will induce the court to give costs against him, as *spoliation* or secreting the will.

[*388]

I should have decreed the defendant the heir his costs, notwithstanding one witness has sworn positively to an attempt of concealing the will, because it is as positively denied by the defendant's answer; but then it appears likewise, that after the heir was informed that the will was in the hands of a particular person, he went and took out administration upon the oath usual on those occasions, without ever making any inquiry after the person whom he was informed by letter had the will in his custody.

This is such an improper behaviour in the heir, that I will not give him his costs.

(1) *Bidulph* v. *Lidulph*, 2 P. W. 285. (2) *Lord Weal* v. *Clarendon*, ante 2 vol. 424.

Case 129. *Joynes* versus *Statham*, *October* 29, 1746.

A bill brought to carry an agreement into execution for a lease of a house which was signed by the defendant the lessor only, who by his answer insisted it ought to be inserted in the agreement that the tenant should pay the rent clear of taxes, the plaintiff who wrote the agreement having omitted to make it so, and offered to read evidence to shew this was a part of the agreement. *The evidence ought to be admitted, for if there has been [illegible], the defendant ought to have the benefit of it by way of defence to a specific performance.*

THE bill was brought to carry an agreement into execution for a lease of a house during the life of the defendant's wife, which was signed by the defendant the lessor only: upon the face of the agreement the plaintiff was to pay a rent of nine pounds a year.

The defendant insists by his answer, that it ought to have been inserted in the agreement that the tenant should pay the rent clear of taxes, but the plaintiff having written the agreement

ment himself, and omitted to make it clear of taxes, and that the defendant, unless this had been the agreement, would not have sunk the rent from fourteen pounds to nine pounds, and offered to read evidence to shew this was part of the agreement. JOYNES v. STATHAM.

The plaintiff's counsel insisted, that the defendant ought not to be admitted to parol proof, to add to the written agreement, which is expressly guarded against by the statute of frauds and perjuries.

The cases cited for the plaintiff were *Cheney's* case, 5 *Co.* 68. 1. and *Selwin* versus *Brown*, *Cas. in Lord Talbot's time*, 248.

For the defendant was cited *Walker* versus *Walker*, *December*, the 10th and 11th, 1740, before Lord *Hardwicke*. (*Vide ante* 2 *Tr. Atk. Cas.* 92. *pa.* 98.) [389]

LORD CHANCELLOR,

I permitted this point to be debated at large, because it is decisive in the cause, for I am very clear this evidence ought to be read.

This has been taken up by way of objection to the plaintiff's bill.

The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance, or leave the plaintiff to his remedy at law.

It is the discretion of this court, whether they will decree a specific performance, or leave the plaintiff to his remedy at law.

Now, has not the defendant a right to insist, either on account of an omission, mistake, or fraud, that the plaintiff shall not have a specific performance?

It is a very common defence in this court, and there is no doubt but it ought to be received, and quite equal whether it is insisted on as a mistake, or a fraud.

It appears the agreement was drawn and written by the plaintiff himself; the defendant too cannot write, but is a *marksman* only; if there has been an omission, should not the defendant have the benefit of it by way of objection to a specific performance?

There have been many cases in this court, where such evidence has been admitted.

Suppose an agreement for a mortgage drawn by the mortgagee, the mortgagor being a marksman, and the mortgagee omits to insert a covenant for redemption, and then brings a bill to foreclose, shall not the mortgagor be at liberty to insist in this court upon reading evidence to shew the omission?

A mortgagee in an agreement for a mortgage omits to insert a covenant for redemption, the mortgagor shall be permitted to read evidence to shew the omission.

So in a case which has happened, of the mortgage being drawn in two deeds, one an absolute conveyance, the other a

A mortgage drawn in two deeds, one an absolute conveyance, the other a defeasance, which mortgagee omits to execute, the mortgagor shall be admitted to shew the mistake.

JOYNES v. STATHAM.

defeasance, and the mortgagee omits to execute the defeasance, the mortgagor shall be admitted to shew the mistake (1).

Suppose the defendant had been the plaintiff, and had brought the bill for a specific performance of the agreement, I do not see but he might have been allowed the benefit of disclosing this to the court.

[390] Because it was an agreement executory only (2), and as in leases there are always covenants relating to taxes, the Master will inquire what the agreement was as to taxes, and therefore the proof offered here is not a variation of the agreement, but is explanatory only what those taxes were: I am of opinion to allow the evidence of the omission in the lease to be read.

(1) *Walker* v. *Walker*, *ante* 2 vol. 99. (2) *Vid. Po[illegible]* v. *Wyatt*, 3 *Bro. Cha. Rep.* 154.

Case 130. *Framlingham* versus *Brand*, *November* 7, 1746.

1 Wils. 140. S.C. S. by her will says I devise my house, &c. to my son *Robert*, and his heirs and assigns for ever, and in case he shall happen to die in his minority, and unmarried, or without issue, I give it to my son *Henry* and his heirs. *The estate is to go over only upon the contingency of Robert's dying during his minority, and he shall take a fee upon his coming of age, and is subject to his specialty debts* (1).

THE testatrix, who was the mother of the plaintiff's husband, and the defendant, by two *venters*, by her will says, I devise my house, &c. to my son *Robert*, (the plaintiff's husband) and his heirs and assigns for ever, *and in case he shall happen to die in his minority, and unmarried, or without issue, I give it to my son Harry* (*the defendant*) *and his heirs*.

The mother died soon after she made the will; *Robert came of age* and married, but died without issue, having left debts by specialty.

The cases cited for the defendant were *S[illegible]* versus *Gerrard*, *Cro. Eliz.* 529. *W[illegible]* versus *Glisbr[illegible]*, 2 *Vern.* 358. *Hanbury* versus *Cockrill*, *[illegible]* 1 [illegible]. See *Viner's Abridg.* title *Devise* 21[illegible]. *pl.* 4. Lord *Vaux's* case, *Cro. Eliz.* 267.

LORD CHANCELLOR,

The question is, If this was a devise of an estate-tail in the plaintiff's husband, with remainder over to *Henry*; or if a fee with an executory devise to *Henry*, on these contingencies.

I am clearly of opinion this is a fee with an executory devise, and agreeable to all the cases.

The first words give a fee; but it has been said, it may be by explanatory words controuled to an *entail*, the question is, if that has been done.

The defendant's counsel say, that, to make it an entail, the testatrix need have done no more than have said, if *Robert* dies without issue, I give it to my son *Harry*, and all the rest is im-

(1) See the cases cited in the note to *Walsh* v. *Peterson*, *ante* 193.

material

material, *and that this would* have turned the general heirs into heirs of the body; but insist still that what follows are three distinct contingencies, *if Robert dies in his minority, if he dies unmarried, or if he dies without issue.* FRAMLINGHAM *v.* BRAND.

Should this construction prevail, had *Robert* married and had issue, and had died under age, if there are three several contingencies, the child would have been disinherited, and the estate gone over to another. [391]

This would be contrary to the meaning of the will, and all the rules, which endeavour to make a construction agreeable to the intention of a testator, which is in this case confined to *Robert*'s dying unmarried, or without issue, during his minority.

This is not like the case of *Soule* versus *Gerrard, Cro. Eliz.* 529. and besides at that time the doctrine of executory devises was not well settled.

Here it is one contingency of *Robert*'s dying under age, attended *with two qualifications,* of his being unmarried, or dying without issue.

The word *or* has a reference to the different qualifications that may happen during the minority, which are all tied up to *Robert*'s dying under age; and though the expression *unmarried* was unnecessary, yet the mother intended to express her desire, that if he married under age, the estate should vest so as to intitle the wife to dower, therefore is different from Lord *Vaux*'s case in *Cro. Eliz.* 267. because there it appears by what the testator clearly expressed, that he designed by the words to make the several sentences so many contingencies.

But it is not a general rule, that *a disjunctive* at the end of a period shall make all the preceding sentences disjunctives, if the intention appears against it.

A disjunctive at the end of a period shall not make all the precedent sentences so, if the intention appears against it.

Upon the whole, I think the estate is to go over only upon one contingency of *Robert*'s dying during his minority, subject to the qualifications of his being unmarried, and without issue at his death; and consequently the estate vested in the plaintiff's husband, *upon his coming of age,* and is subject to his debts on specialty.

Mary Phillips versus *Constantia Phillips, alias Muilment. November 6, 1746.* Case 131.

MR. *Evans,* on behalf of *Constantia Phillips,* moved to refer to the Master, to whom the cause stands referred, the affidavit of her solicitor for impertinence, it being full of *Constantia Phillips*'s going to masquerades and balls, and was made in the course of the inquiry before the Master, about his bill of costs.

The court made an order to refer to a Master the affidavit of the plaintiff's own solicitor for impertinence.

Phillips v. Phillips.

Mr. Baron Clark, sitting for Lord Chancellor, seemed to doubt whether it could be done; but Mr. *Evans* informing him that there had been such motions, *Mr. Baron Clark* asked the register *Mr. Rainsford* what was the practice, who said, there had been such orders; and upon that *Mr. Baron Clerk* directed it accordingly (1).

(1) *Reg. Lib.* B. 1746. fol. 11.

Case 132. *Worsley* versus *The Earl of Scarborough, November* 15, 1746.

LORD Chancellor said, that where a sum of money in trust is already laid out upon a real security, and afterwards the said sum is laid out by the trustees upon another estate, it is a very different case, and stands upon very different principles, than where a sum of money is intended to continue as it is in the hands of trustees, and they lay out that sum in the purchase of an estate; because here the nature of the property is altered, and it is become quite another thing; but in the former case the nature of the property is the same, and continues unaltered, though it is transferred to another estate (1). *Vide Ryal* versus *Ryal, February* 4, 1739. 1 *Tr. Atk.* 59.

A decree is not an implied notice to a purchaser after the cause is ended, but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there (2).

Secondly, That there is no such doctrine in this court, that a decree made here shall be an implied notice to a purchaser after the cause is ended; but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation, and then in contest; but where it is only a decree to account, and not such a one as puts a conclusion to the matters in question, that is still such a suit as does affect people with notice of what is doing.

Thirdly, No case has gone so far, and it would be very inconvenient, if where money is secured upon an estate, and there is a question depending in this court upon the right of or about that money, *but no question relating to the estate, upon which it is secured, but is wholly a collateral matter, that a purchaser of the estate pending that suit should be* affected with notice by such implication as the law creates by the pendency of a suit.

Notice to an agent or counsel who was employed in the thing by another person, or in another business, and at another time, is no notice to his client who employs him afterwards.

Fourthly, It is settled, that notice to an agent or counsel *who was employed in the thing by another person, or in another business, and at another time*, is no notice to his client, who employs him

(1) So *Wallis* v. *Whorwood*, ante 2 vol. 159. 483. n. 2. *Garth* v. *Ward*, ante 2 vol. 174.
(2) *Vide Sorrel* v. *Carpenter*, 2 *P. W.*

afterwards;

afterwards; and it would be very mischievous if it was so, for the man of most practice and greatest eminence would then be the most dangerous to employ (1). Worsley v. The Earl of Scarborough.

(1) So Lowther v. Carlton, ante 2 vol. 242. Warrick v. Warrick, ante 294. But see Le Neve v. Le Neve, post, 646.

Graham versus Londonderry, November 24, 1746. Case 133.

[393]

THERE was a question in the cause between Mr. Graham and Lord Londonderry, whether Lady Londonderry, now the wife of the plaintiff, but originally the wife of the late Lord Londonderry, was intitled in her own right, or as paraphernalia, to particular jewels hereafter mentioned.

Diamonds given to the wife by the husband's father, on her marriage with his son, are considered as a gift to the separate use of the wife, and she is intitled to them in her own right.

First, as to diamonds given her by Governor Pitt her husband's father, and which were a present to her on the marriage with his son.

LORD CHANCELLOR,

This court of latter years have considered such a present as a gift to the separate use of the wife; and I am of opinion she is intitled in her own right.

The next question was as to four diamonds set about the picture of the late regent of France.

Lord Londonderry returned from France, and delivered this picture to Lady Londonderry, and said at the same time it was a present sent her by the regent of France.

If this be considered as a present from the regent of France, it falls under the same rule, for being a present by a stranger during the coverture must be construed as a gift to her separate use, though I do not think it so clear a case as the other.

A present by a stranger to the wife during the coverture must be construed as a gift to her separate use, though not so clear a case as the other.

There have been several cases.

Mrs. Hungerford's case, which was money appropriated for her separate use, and decreed to her.

Another case of the late Countess Cowper, before Sir Joseph Jekyll, several trinkets were given her by Lord Cowper in his life-time, and determined to be her separate estate (1).

Trinkets given to a wife by a husband in his life-time, determined to be her separate estate.

Two cases in my time; the first was Lucas versus Lucas, July 2, 1738, 1 T. Atk. 270. there were two questions, one in respect of 1000 l. South-sea annuities, which the husband had transferred in the name of his wife; the other as to jewels, &c. given by the plaintiff's wife's father to the wife.

(1) Sed vide Ridout v. Plymouth, ante, 2 vol. 105.

GRAHAM v. LONDONDERRY.

I was of opinion she was intitled both to the *South-sea* annuities and the jewels, because I considered them as given to her separate use.

The second case was heard upon the 19th of *November* 1740, *Brinkman* versus *Brinkman*.

Certain pieces of plate were given to the wife immediately after the marriage by the husband's father; I was of opinion they were to be considered as gifts to the wife for her separate use.

Next as to the diamond necklace that underwent several alterations, but must be confined to such diamonds as were in it at the time of Lord *Londonderry*'s death.

This is not to be considered as a gift merely to the separate use of the wife.

Where a husband expresly gives a thing to a wife to be worn as ornaments of her person only, they are to be considered merely as *paraphernalia*.

I have indeed admitted a husband may make such gifts, but where he expresly gives any thing to a wife to be worn as ornaments of her person only, they are to be considered merely as *paraphernalia*, and it would be of bad consequence to consider them as otherwise; for if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention.

But this will be the same thing as to Lady *Londonderry*'s interest, if it can be proved she wore them as the ornaments of her person.

It is not necessary to prove she wore them all times, but only upon birth days, and other publick occasions, which it has been proved she did.

I am therefore of opinion she is intitled, unless the objection should prevail, of the alienation by the husband in his life-time.

A husband may alien the jewels a wife wears for the ornament of her person.

For whatever jewels a wife wears for the ornament of her person, the husband may alien in his life-time (1).

But I am of opinion the act Lord *Londonderry* did amounted not to an alienation.

The diamond necklace was pledged as a collateral security for 1000 *l.* borrowed by Lord *Londonderry*, of Mr. *Middleton*, and a bond given at the same time, which shews it was intended as a personal security from himself; a power likewise was given to Mr. *Middleton*, whilst Lord *Londonderry* was out of *England*, to sell the necklace for 1500 *l.*

[395] This does not amount to a sale, but only a necessary power in order to reimburse Mr. *Middleton*, when sold, his principal and interest.

But it was not sold, and therefore at his death stood only as a pledge.

If a husband pledges the wife's *paraphernalia*, and leaves a sufficient estate to redeem the pledge, she is intitled to have it redeemed out of his personal estate.

I am of opinion, if a husband pledges the wife's *paraphernalia*, and dies, leaving a sufficient estate to redeem the pledge, and pay

(1) *Seymore* v. *Tresilian*, ante 359.

all

all his debts, she shall be intitled to have it redeemed out of the husband's personal estate.

GRAHAM v. LONDONDERRY

The case of *Tipping* versus *Tipping* in 1 *P. Wms.* 730, is a much stronger case; that the right of the wife to *paraphernalia* is to be preferred to that of a legatee; a leading case, and has been followed by the court ever since (1).

The right of the wife to *paraphernalia* is to be preferred to that of a *legatee*.

Suppose Lord *Londonderry* had given this necklace to a legatee specifically, the legatee would have been intitled to come into this court to have it disincumbered, and the right of the wife is superior to that of any legatee; and therefore I declare she is intitled to the necklace, and as it has been sold she is intitled to an account according to the value at which it has been sold.

As the diamond necklace has been sold, Lady *Londonderry* is intitled to an account according to the value at which it has been sold.

(1) *Snelson* v. *Corbet*, *ante* 370.

Benson versus *Gibson*, *November* 26, 1746. Case 134.

A Bond was given by the plaintiff to the defendant, who was a hair-merchant, as a security for his service and behaviour in *Flanders* as an agent for the defendant in buying hair there; the plaintiff was to stay abroad till a certain season, and as a security for his performance of the agreement he deposited a hundred pounds in the hands of the defendant.

A bond given by the plaintiff to the defendant, who was a hair-merchant, as a security for his service and behaviour in *Flanders* as an agent for buying hair, and as a security for his performance of the agreement deposited 100*l.* in the defendant's hands. He bought only 5*l.* worth of hair, and returned to *England* before the time agreed. *This penalty cannot be decreed here, because this is a bond* for service *only, and different from* a nomine pœnæ *in leases to prevent a tenant from plowing.*

The plaintiff bought but *five* pounds worth of hair for the defendant, and returned to *England* before the time agreed between them.

The bill was brought for fifty pounds a year agreed to be paid by the defendant for the plaintiff's trouble, and also for *the deposit*.

It was insisted for the defendant this was a breach of the plaintiff's duty, and a forfeiture of the bond, and that the defendant has a right to retain the hundred pounds in satisfaction of the penalty; and that this court will not relieve against it, for it is the stated damages between the parties; and they cited the case of *Roy* versus *the Duke of Beaufort*, before Lord *Hardwicke*, *June* 5, 1741 (1), and likewise compared it to the cases of *nomine pœnæ* in leases. [396]

LORD CHANCELLOR,

I cannot decree this penalty here, because this is a bond for services only, and different from a *nomine pœnæ in leases*, to prevent a tenant from plowing, because that is the stated damages between the parties (2).

(1) *Ante* 2 vol. 190. S. C.

(2) See *Aylett* v. *Dodd*, *ante* 2 vol. 229.

Nor

Benson v. Gibson.

Where a person is guilty of a breach of a bond given as a security not to defraud the revenue, this court will not relieve against it, because it is considered at law as a crime.

Nor is it like the case of bonds given as a security not to defraud the revenue, because there, where a person is guilty of a breach, it is considered in law as a crime, and this court will not relieve for that reason.

The court in this case can only direct an action at law upon a quantum damnificatus, to try how far the defendant has been damnified.

Here I cannot decree the penalty, but must direct an action at law upon *a quantum damnificatus*, to try how far the defendant has been damnified by the plaintiff's non-performance of the service.

Lord Hardwicke recommended it to the parties to agree it upon the following terms; that the defendant should pay back only ninety pounds of the deposit, and the bill to be dismissed without costs of either side; which was agreed to accordingly.

Case 135. *Lampley* versus *Blower*, *November* 27, 1746.

A. H. by her will says, I give to my nieces *F. L* and *A. F.* each one half of the produce of bank stock, *and to their issue*, and if either shall happen to die before the legacy became due to her, *and leave no issue*, the share of her so dying shall go to the survivor *F. L.* died before the testatrix, leaving a son, who has brought his bill for a moiety of the produce of the bank stock. The words *leave no issue* confine it to *F. L.*'s *leaving no issue* at the time of her death, and are relative to any child the legatee might have at her death, and therefore a moiety of the produce of the bank stock was decreed to the son of *F. L.* (1).

ANN *Hough* by her will says, "I give to my nieces *Frances* "*Lampley*, the wife of Lampley, and *Ann Blower*, "both in *Barbadoes*, each one half of the produce of bank stock, "*and to their issue*, and if either of them shall happen to die be- "fore the legacy become due to her, *and leave no issue*, the share "of her so dying shall go to the survivor."

Francis Lampley had a son at the time of the devise, and died before the testatrix, leaving a son, the now plaintiff, who brings his bill for the moiety of the produce of the bank-stock.

[397] Mr. *Browning* for the plaintiff cited *Wild*'s case, 6 *Co.* 16 *b.* and insisted a devise to the mother and her issue makes it a joint-tenancy, and that, as he has survived his mother, he is become intitled to her whole share.

Mr. Solicitor General for the defendant, who is the residuary legatee, insisted, that the construction must be the same, as if Mrs. *Lampley* had survived the testatrix.

There is no bequest to the ancestor for life, and therefore the children cannot take by way of remainder, and consequently it would be contrary to the meaning of the testator that the issue should take.

As it is to both the nieces, and their issue, the word *issue* can be a word of limitation only.

In case she die *and leave no issue*, must mean to go to issue generally.

(1) The reader is referred to *Hodgson* v *Bussey*, *ante* 2 vol. 89. *n.* 1.

That

That the rule laid down by the plaintiff's counsel is wrong, and insisted that a devise to *A.* and his issue, though *A.* has issue at the time, is an estate-tail. LAMPLEY v. BLOWER.

LORD CHANCELLOR,

Such a construction must be made, as that the plain intention may take place, so as it be consistent with the rules of law, and such a construction may be made as is not at all repugnant to the rules of law.

The word *issue* is capable of three senses.

In one sense, as a word of description to take in jointenancy.

In another, as a word of limitation.

And in a third, as a description of the person in remainder.

I am of opinion it is not the *first*, to take in jointenancy, because the devise is *to them and their issue*.

It is true in *Wild's* case the word *child* was construed to give him a jointenancy with the parent (1), but that determination was before it had been fully settled, that the word issue was as proper a word of limitation as heirs of the body; as in the case of *King* versus *Melling*, 1 *Vent.* 214, 225. the ground of the judgment in *Wild's* case was, that there were no words to shew they should take by limitation.

But in the present case here are words to shew the issue should take after the death of the mother. [398]

The words *leave no issue*, are relative to any child the legatee might have at the time of her death.

If it stood barely upon the words to *A.* and her issue, or to *A.* and her heirs of the body, the first taker would have the whole, but it is not meant in that sense.

"*And if either of them shall happen to die before the legacy becomes* "*due to her, and leaves no issue, the share of her so dying shall go to* "*the survivor.*"

What is the meaning of this contingency?

The will was made in *England*, and the legatees lived in *Barbadoes*; and the testatrix could not know at that distance but both might have issue.

The legacies vested immediately, and therefore it was intended to secure them to the issue, if the parents died in the testatrix's life-time.

Suppose Mrs. *Lampley* had died without leaving issue, would not this have been a good devise over to the survivor of the nieces? therefore I am of opinion this was a contingent limitation to the other niece *Ann Blower*, if Mrs. *Lampley* died without issue, and the whole did not vest in the first taker; and according to the resolution in *Forth* v. *Chapman*, 1 *Wms.* 663. ought to be construed *leaving no issue at the time of the death.*

This was a contingent limitation to *A. B.* if *P. L.* died without issue, and the whole did not vest in the first taker; but according to the resolution in *Forth* versus *Chapman* ought to be construed *leaving no issue at the time of the death.*

In that case it was a mixed fund of both real and personal estate, the present is stronger, as it is merely a personal chattel.

(1) So *Buffar* v. *Bradford*, ante 2 vol. 220.

The

LAMPLEY v. BLOWER.

A. devises to a man and his heirs, and afterwards s ys, if he shall die without heirs of his body, this controuls it to an estate tail.

The word *leave* explains the word *issue* in the first part of the devise to mean such as was left at the time of the death.

There is nothing more common than that subsequent words descriptive of the contingency explain the former; as a devise to a man and his heirs, and aftewards testator says, and if he shall die without heirs of his body, controuls it to an estate-tail; so here the subsequent words, if she shall happen to die, &c. *and leave no issue*, confine it to leaving no issue at her death, and not generally: his Lordship decreed a moiety of the produce of the bank stock to the plaintiff, the son of Mrs. *Lampley* (1).

(1) *Reg. Lib* B. 1746. fol. 74.

Case 136. *Darley* versus *Darley*, *December* 6, 1746 (1).

[399]

A bill was brought by the plaintiff for two legacies of 50 *l*. left to himself and his sister under their grandfather's will, and for the interest made of them; the defendant, who is executor to the plaintiff's father, insisted on being allowed 105 *l* for putting out the plaintiff apprentice, and 50 *l*. for the maintenance and cloathing the sister. *A father cannot apply a legacy left by a relation to a child in the maintenance of such child, nor can he put him out an apprentice with the money arising from the legacy.*

A Bill was brought by the plaintiff for two legacies of 50 *l*. and 50 *l*. left to himself and his sister under the will of their grandfather, and for the interest that has been made thereof.

The

(1) The Master of the Rolls in *Lee* v. *Pruaux*, 3 *Bro. Cha. Rep* 381. states this case from *Reg. Lib.* A. 1746. fol. 263. thus. The cause was heard upon the original and supplemental bills; the latter of which charges, "that the plaintiff's father was a man of no substance, and incapable of maintaining himself; which made the plaintiff's grandfather averse to the match; but he afterwards consented upon the plaintiff's father assuring him, that he would not intermeddle with any part of the estate or effects, he should after the marriage think fit to convey; but that the wife should have the sole power of disposing thereof by will, or any other mode of appointment: that the plaintiff's grandfather being possessed of the term of 1000 years in certain premises in the bill mentioned did by indenture dated 30th *October*, 1708, and made between himself and plaintiff's mother (though a *feme covert*) in consideration of natural love and affection and her livelihood and future support assign a moiety of such term to the mother her executors, &c. to hold from his decease. Upon the death of the grandfather, the plaintiff's father acknowledged, that he had given the mother power to make a will, and particularly that the father had by an instrument in writing 2d *April*, 1711, promised to pay 200 *l*. to such person as she should by will appoint; and upon 1st *Aug*. 1715, he had also given her a power to devise 1000 *l*. as she might think fit, and had subjected himself to pay the same, upon the 26th, *June* 1738, the mother made her will, and gave in pursuance of *her power* to the plaintiff the moiety of the aforesaid term, and the respective sums of 200 *l*. and 1000 *l*. That the plaintiff delivered the will to the defendant *J. Darley* to shew to his father, which he did: and that the father having considered the said provision as quite sufficient, left the plaintiff only 1 *s*. In a bill filed against the father in his life-time, the father admitted by his answer that he had been informed, that the mother had made such will, but submitted whether she had a power so to do without his consent; but it did appear that he had made some agreement, that she should have a separate estate. The son *J. Darley* by his answer

The sister's legacy he claims by assignment from her. — Darley v. Darley.

The defendant insists he is not obliged to account to the plaintiff for principal or interest, one hundred and five pounds being expended for putting him out apprentice, and much more than fifty pounds in the maintenance and cloathing the sister.

Lord Chancellor,

Where legacies are given to a child by a relation, a father cannot make use of it in the maintenance of such child, but must provide for him out of his own pocket (1); nor can he set him out in the world, or put him out an apprentice, or clerk, with the money arising from the legacy, and if he does it, he shall not be allowed it.

There is another question in relation to an estate given to a husband for the *livelihood* of the wife, whether this ought to be considered as a separate trust for the use of the wife.

Where an estate is given to a husband for the livelihood of the wife, he may be considered as a trustee for her separate use.

I am of opinion that, where an estate is given to a husband for the use of the wife, he may be considered as a trustee for her separate use (2).

Technical words are not necessary to make it a separate trust, for the word *livelihood* is sufficient to shew the intention of the giver, that it should be *to her sole and separate use*.

To make a separate trust technical words are not necessary (3).

The husband in his life time, by note under his hand, dated the 22d of *April*, 1715, or in the nature of a certificate declared his wife might dispose of the sum of two hundred pounds in such manner as she thought proper.

She survived the husband, and by will disposes of all such goods, chattels, &c. as she had a power to dispose of.

[400]

I do not know of any case where it has been held, that a mere voluntary promise of a husband to a wife, and executory only, has been carried into execution by this court, for it is a *nudum pactum*, and would not be carried into execution between strangers; and therefore his Lordship seemed to think it ought not, where it is a promise only from a husband to a wife.

No case where it has been held, that a mere voluntary promise of a husband to a wife, and executory only, shall be carried into execution by this court.

"swer afterwards insisted, that there "never was any formal power delegated "to her by the father, except by letter "in the year 1715, and that if such letter "was to be considered as giving her such "a power with respect to the 200 *l.* and "1000 *l.* that the same ought not to be "executed; as the father subsequent "thereto executed a bond in full discharge, by way of defeazance of any "such instrument, and completely annulled the other power. By the decree, the original and supplemental "bills, as far as the same related to the "moiety of the term mentioned in the "paper 22d, *April* 1715, and the 1000 *l.* "in the letter of the 9th, *August* 1715, "the 200 *l.* in the instrument of 22d, "*April* 1715, were dismissed."

(1) *Butler* v. *Butler*, *ante* 60. note.

(2) *Vide Harvey* v. *Harvey*, 1 P W. 125. *Bennet* v. *Davis*, 2 *P. W.* 316. *Rolfe* v. *Budder*, *Bunb.* 187. *Tyrrel* v. *Hope*, *ante* 2 vol. 562.

(3) *Vide Lee* v. *Prieaux*, 3 *Bro. Cha. Rep.* 381. *Tyrrell* v. *Hope*, *ante* 2 vol. 561.

"Lord

Darley v. Darley.

"*Lord Chancellor* ordered that the bill, so far as it seeks relief "for the sum of 200*l.* mentioned in the paper dated the 22d "of *April*, 1715, do stand dismissed; and further ordered, that "it be referred to a Master to compute interest on the legacies "of 50*l.* each, given by the will of *John Vincent* to the plaintiff *Theodore Darley*, and *Elizabeth Darley* his sister, from "the time they respectively attained their ages of 21, at 5 *per cent. per ann.* and that what shall be found due for principal "and interest of these legacies, be paid by the defendant *Vincent Darley* to the plaintiff, he having admitted assets of the "father for that purpose; and also to take an account of "such interest as was received by *Theodore Darley* the father in "his life-time, on any of the principal sums, part of the trust "estate; and the defendant *Vincent Darley*, executor of *Theodore Darley*, is to be charged with so much as shall appear on the "said inquiry to have been got in by *Theodore Darley* the father, "and answer the same, and also the interest received by the "said *Theodore Darley* belonging to the trust estate; and the defendant *Vincent Darley* is to be charged with interest for so "much of the principal sums of the trust money as was received by "*Theodore Darley*, and not applied according to the trust; and "the Master is to distinguish and ascertain what was due, and in "arrear for interest of the trust money at the time of the death "of *Sarah Darley* the plaintiff's mother, and what was so due "upon arrear at her death to be paid to the plaintiff *Darley*."

Case 137. *Wicks* versus *Marshall and others, December* 6, 1746.

Where a cause stands over for want of making some defendants parties, you cannot proceed against any other unless the plaintiff will submit to dismiss his bill, as to those defendants who are improperly brought before the court.

THE bill was brought by the plaintiff, as assignee of *Knott* a bankrupt, against the defendants, to account for a sum of money, which the bill charges they have received of *Knott* since his bankruptcy.

Some of the defendants being agents only and not principals, the cause was ordered to stand over in order to make the principals parties.

Mr. *Wilbraham*, counsel for the plaintiff, would have gone on against another defendant, as it was a distinct claim from the rest of the defendants; but Lord *Hardwicke* said, where a cause stands over for want of making some defendants parties, you [401] cannot proceed against any other defendant, unless the plaintiff will submit to dismiss his bill, as to those defendants who are improperly brought before the court.

It is not usual to bring bill against a person for money received of a bankrupt since his bankruptcy, when you may recover at law, provided you can prove the person who received the money of the bankrupt had notice of his bankruptcy, and an action of trover is the proper one for this money.

His Lordship said, that it was not usual to bring a bill here for a demand of this nature, when you may recover at law,

provided

provided you can prove the person who received the money of the bankrupt had notice of his being a bankrupt (1); but it must not be in an action for money had and received to the use of the assignee under the commission; because that would affirm the contract; but an action of trover would lie for this money (2).

WICKET v. MARSHAL, &c.

(1) His Lordship ordered *Marshall* to pay 22 *l* admitted by his answer to have been received by him of the bankrupt, to the assignees under the commission. *Reg. Lib* B. 1746. fol. 152.

(2) *Vide Billon* v. *Hyde*, *ante* 1 *Vol*. 128. note 1.

Barret versus *Gore and Umfreville*, *December* 15, 1746. Case 138.

At law you may in an action of trespass examine a defendant in favour of another defendant, where he is not interested in the event of the cause, but there he cannot be examined for the plaintiff.

THE bill was brought for a specific performance of an agreement, which was deposited in the hands of the defendant *Umfreville*, by the mutual consent of the plaintiff, and the defendant Sir *Samuel Gore*; *Umfreville* too was the attorney who drew up the agreement; some disputes arising afterwards between the plaintiff and the principal defendant, the plaintiff sent his agent to *Umfreville*, to desire a copy of the agreement; he told him he would not give him one, for it was no agreement as he had not been paid for it; at another time threatened he would burn it; and at a third that he would destroy it; and afterwards in breach of his trust delivered it up to the defendant Sir *Samuel Gore*.

At the hearing of the cause, the defendant Sir *Samuel Gore* offered to read the deposition of the defendant *Umfreville*, in order to prove it a conditional agreement only, and for other purposes

The plaintiff's counsel objected to his evidence, as swearing to excuse himself, and being likewise to prove facts directly contrary to his answer.

Lord *Hardwicke* allowed the objection, and said, to be sure, even at law, you may in an action of trespass examine a defendant in favour of another defendant (1), where he is not interested in the event of the cause, but there he cannot be examined for the plaintiff, because by making him a party to the action, the plaintiff has precluded himself from the benefit of his evidence.

In this court you may read the deposition of a defendant for the plaintiff likewise.

This court goes farther, and you may not only read the deposition of one defendant for another, but for the plaintiff likewise.

If the defendant may by possibility only be liable to costs, this is always a reason for refusing his evidence, because he is swearing to excuse himself.

Yet if the defendant, who is offered in evidence for another defendant, may not necessarily, but by possibility only, be liable to costs, this is always a reason for refusing his evidence;

(1) *Vide Paddock* v. *Brown*, 3 P. W. 288. *Nightingale* v. *Dodd*, *Amb*. 583.

Barret v. Gore.

If a person will so act as to make himself a proper party to the cause, and liable *primâ facie* to the costs, tho' the only one present at the agreement, yet the rule must prevail against his deposition being read as evidence.

because he is interested so far as to be swearing to excuse himself.

And though it is objected here by Sir *Samuel Gore's* counsel, that this is bringing him before the court with his hands tied, for no other person was present at the time of the agreement, between *Barret* and *Gore*, but *Umfreville*; yet I do not think even this is sufficient to intitle the defendant Sir *Samuel Gore* to read this deposition, for if a person will act in such a manner as to make himself a proper party to the cause, and liable *primâ facie* to the costs, though he was the only person present at the agreement, yet the rule must prevail against his deposition being read as evidence, and his Lordship determined accordingly.

Case 139. *Moore* versus *Moore*, *Rehearing*, *December* 16, 1746.

Where legacies are charged upon personal estate, and interest directed to be paid, the court in this case always allows the legal interest (1).

A Person by his will, in 1713, gives legacies chargeable upon a leasehold estate determinable at the end of ninety-nine years, and directs interest to be paid upon those legacies from the year 1720.

At the time of making the will interest was at six *per cent*, and reduced to five at *Michaelmas*, 1714.

At the hearing of the cause, there being mortgages upon the leasehold, the Master of the Rolls, sitting for the Chancellor, decreed the legatee's interest only at the rate of *four per cent.* upon a suggestion it was a deficient estate.

It was re-heard as to this point only.

Lord Chancellor altered the decree so far, and directed *five per cent. interest upon the legacies*; and said, though charged upon leasehold estate, yet it is the same thing as if it was to come out of the personal estate at large, and the court in this case always allows the legal interest.

Where legacies are charged on the real estate, the rule of the court is to give one *per cent.* less than the legal interest, as it is a good security for the principal.

But if legacies are charged upon the real estate, the court directs four *per cent.* only, on account of its being a good security for the principal, and the rule they have constantly gone by in this latter case is to give one *per cent.* interest less than the legal.

(1) *Vid. Guillam* v. *Holland*, *ante* 2 vol. 343. and note.

Brett versus *Forcer and others, February* 3, 1746. Case 140.

PREVIOUS to the marriage of *George Savage* with *Frances Forcer*, articles were executed bearing date the 11th of *October*, 1740, between *Francis Forcer* and *Frances* his daughter on the one part, and *George Savage* on the other part; and it was thereby covenanted by the father of the intended wife, that at the solemnization of the marriage he would pay one thousand pounds to the husband, and that his heirs, executors and administrators should pay likewise to the husband, his executors, administrators or assigns, six months after the death of the father, the further sum of five hundred pounds, as the remainder of the marriage portion of the wife; and by the same deed the husband contracted that he would give security by specialty, covenant or obligation, that in case his wife survived him, his heirs, executors or administrators, within six months after his death, should pay her one thousand pounds, and likewise that she shall be intitled to such share of his personal estate as the wife of a freeman of London would be.

Previous to the marriage of G. S. the father of the intended wife covenants to pay 1000*l.* to the husband on the marriage, and that his heirs, executors, &c. should pay likewise to the husband, his executors, &c. six months after the father's death, 500*l.* as the remainder of the wife's portion. After the father-in law's death, the husband being indebted to the plaintiff, assigns the 500*l.* to him as a security for the debt. *The executrix of the wife's father directed to account for the 500l. to the plaintiff, as it never was the money of the wife, but a debt due to the husband himself.*

The marriage took effect on the 11th of *November* and the husband gave his bond three days afterwards.

George Savage is now a bankrupt, but before the bankrupcy, and after the death of his father-in-law, being indebted to the plaintiff, assigned the five hundred pounds to him as a security for the debt (1).

The bill is brought by the assignee of the five hundred pounds, against the executrix of the wife's father, against *Savage* the bankrupt and his wife, and the assignees under the commission, for this five hundred pounds.

Mr. Solicitor General, counsel for the plaintiff, insisted that this is out of the common rule, *that whoever comes here for the wife's fortune, must first make a provision for her*, because that rule has been confined to persons who stand exactly in the same light with the husband; but the court has distinguished where the plaintiff has been a creditor of the husband for a valuable consideration and have decreed for him without obliging him to make any provision for the wife.

That there is likewise this favourable circumstance for the plaintiff, the five hundred pounds was not to be paid to the wife, or her separate use, but to the husband himself.

He cited *Jewson* versus *Moulson*, the 27th of *October* and 6th of *December*, 1742, as a case in point. (*See* 2 *Tr. Atk.* 417.) [404]

(1) But he had previously assigned it to other persons for securing a debt, of which there now remained due about 127*l.*

Mr.

BARTT v. FORBES.

Mr. *Holford* of the same side cited *Squib* versus *Wynn*, 1 *P. Wms*. 378. and *Bennet* versus *Davis*, 2 *P. Wms*. 316. and *Milner* versus *Colmer*, *ib*. 639. and *Cleland* versus *Cleland*, *Prec. in Chanc*. 63.

Mr. Attorney General, counsel for the wife of *George Savage* the bankrupt, said, that it was an agreement previous to marriage, and entered into for a valuable consideration, and executory only.

On the foot of a contract it is a mutual consideration, and therefore the court will construe it to be strictly carried into execution; And though it is no debt due to the wife, yet moves from the father merely in consideration of the daughter, and therefore was a provision for the benefit of the daugher and her children.

Mr. *Smith* of the same side said, it was a rule in equity, the court will not decree a hardship, and if it should be determined against the wife in this case, she must in all probability starve; that this therefore is a reason for the court to stand neuter, and not interfere in favour of the husband.

Fort the defendant was cited the case of *Turton* versus *Benson*, *Prec. in Chanc*. 522.

LORD CHANCELLOR,

This may be an unfortunate case; but notwithstanding the counsel for the defendant the wife say, I should not interpose at all, I cannot in this case refuse to make a decree; for if the court was to stand neuter, the legal interest would be in the assignees under the commission, and they would run away with it who have a less equity than the plaintiff, and therefore I think the court ought to make some decree.

Consider it as if the agreement of the 11th of *October* and the execution of the bond on the 7th *November*, were all one agreement, and all before marriage.

Then it would have stood as an agreement by the wife's father, in consideration of acts to be done on the part of the husband, to pay, &c. (*Vide the words*.)

The first thing insisted on for the wife is, this ought to be considered as part of the estate of the wife, and that the court would not let a husband have it, unless he first makes a provision for her,

[405] nor consequently the plaintiff, he standing only in the husband's place.

Where the wife has a demand in her own right, and the husband applies in her right, if there is no agreement, previous to the marriage, on her behalf, the court will take care of her interest.

Those cases are, where the wife has a demand in her own right, and the husband applies to the court in her right, they will then take care of *femes covert*, where there is no agreement previous to the marriage on their behalf (1); but this never was the money of the wife, for her father has covenanted to pay it absolutely to the husband, therefore is no part of the wife's estate, but a debt due to the husband himself.

The question will depend upon the other objection, with regard to the agreement on the part of the husband in the articles previous to the marriage, that it is an executory contract, and

(1) *Vide Jewson* v. *Moulson*, *ante* 2 vol. 417. and the cases cited there.

the

the whole must be decreed to be carried strictly into execution for the benefit of the wife. BRETT v. FORCER.

I will put this case; Suppose the husband had not been a bankrupt, and had brought a bill against the executrix of the father for a performance of his covenants under the articles, the court could not have compelled the husband to have done more than give the bond, and the wife must have taken her chance as to the share of her husband's personal estate, as any other widow of a freeman, subject to the accidents of trade and bankruptcy; and the husband might have said, I gave a bond three days after marriage, and you have acquiesced in it, and therefore nothing is left executory, for I have performed the whole on my part.

If the husband had not been a bankrupt, and had brought a bill for the performance of the father's covenants under the articles, the court could not have compelled him to do more than give the bond, and the wife must have taken her chance as to the share of her husband's personal estate, and his assignee shall not be in a worse condition than himself.

Then, if the husband would have been intitled, shall an assignee for a valuable consideration be in a worse condition than the husband, the assignor? There are many cases where he has been held to be in a better condition, but none where he has been held to be in a worse.

So that however unfortunate the case of the wife may be, there must be a decree in favour of the plaintiff; for, as I said before, if I stood neuter, the assignees under the commission, who barely stand in the place of the husband, would take the whole from an assignee for a valuable consideration.

Therefore his Lordship decreed the executrix of the wife's father to account for the 500*l.* (1) to the plaintiff.

(1) Which he directed, to be applied in the first place to discharge the debt due to the first assignees, and then the plaintiffs demands. *Reg. Lib.* A. 1746, fol. 291.

Madox versus *Jackson*, *February* 4, 1746 Case 141.

IN the present case, there were three obligors in a bond.

Three obligors in a bond, the obligee brings the principal, and the representative of one of the sureties before the court, and by his bill states the third is dead insolvent; on the circumstances of this case, the objection for the want of parties over-ruled.

The plaintiff, the obligee, has brought only one obligor before the court, and the representative of another, but not of the third, because the bill states that he is dead insolvent.

An objection was made for want of parties by one of the defendants, who insisted that the representative of *Watson*, the third obligor, ought to have been made a party; for it is possible he might have paid off the bond, or at least, if before the court, might contribute his part towards payment of the bond.

The plaintiff's counsel in answer say, that all the defendants believe, that *Watson*, the deceased obligor, died insolvent, and

MADOX v. JACKSON.

and that it appears in the cause, the defendant *Jackson* was the principal obligor in the bond, so that the other two were only sureties.

LORD CHANCELLOR,

Where a debt is joint and several, the plaintiff must bring each of the debtors before the court.

The general rule of the court, to be sure, is, where a debt is joint and several, the plaintiff must bring each of the debtors before the court, because they are intitled to the assistance of each other in taking the account (1).

Debtors are intitled to a contribution.

Another reason is, that the debtors are intitled to a contribution, where one pays more than his share of the debt.

Where the debt is a specialty, make both the heir and executor parties.

A further reason is, if there are different funds, as where the debt is a specialty, and he might at law sue either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets (2).

Where the obligors are only sureties, it is not necessary to bring them before the court.

But there are exceptions to this, and the exception out of the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the court, unless he had paid the debt.

The exception out of the second rule is, that if there are no personal assets at all, and this fact appear plainly in the cause, there is no occasion to bring the representative of that co-obligor before the court.

[407] But this is a special excepted case, and therefore not within the rule.

But suppose it was a common case, and the bill had been brought by the representatives of *Manby*, one of the sureties in the bond, whether it is necessary to make the representative of *Watson* a party.

As to taking of the account, it is quite out of the case, by admission of the defendants, that the bond is not paid, nor any part of the principal and interest, so that here is no ground to make the representative of *Watson* a party, in order to assist him in taking the account.

The other pretence is, in order for a contribution.

It is admitted by all the answers that *Watson* is dead insolvent, and therefore differs from the case of *Ashburst* versus *Eyre* (3), determined before me upon a plea.

For though there was an admission of insolvency in that case, yet it did not appear whether the principal or interest might not have been paid by the co-obligor, who was not before the court, and that was the reason of allowing the plea.

There can be no particular administration to *Watson* here, for that must be to a particular subject belonging to the estate of the intestate, but as he is dead insolvent, there can be nothing but a general administration: and therefore, on the circumstances of this case, Lord *Hardwicke* over-ruled the objection for want of parties.

(1) *S. C. Vide Collins* v. *Griffith*, 2 P. W. 313.
(2) *Vide Galton* v. *Hancock*, *ante* 2 vol.

(3) *Ante* 2 vol. 51. S. C. *ante* 341, S. C.

Only versus *Walker*, *July* 19, 1746, *before the Master of the Rolls, sitting for Lord Chancellor.* Case 142.

THE bill was brought by the plaintiff as the residuary devisee of Mr. *Dyer*, for a specific performance of an agreement.

On evidence of an agreement's being confessed by the defendant, decreed to be carried into execution, though the agreement was proved by one witness only, and positively denied by the defendant's answer (1).

Mr. *Dyer* being an incumbred man, had, in his life-time (2), compounded with several of his creditors, and after his death, the plaintiff, as he states it by his bill, came to an agreement with the defendant, to pay him 29 *l.* as a composition for a bond debt of 84 *l.* and indorsed it upon the back of the bond.

The agreement was proved by one witness only, and positively denied by the defendant's answer, but there was the circumstance of the defendant's confessing the agreement, proved in the cause, and some other circumstances to corroborate the evidence of the single witness.

The Master of the Rolls offered to direct an issue to try the agreement, if the defendant desired it, but the defendant's counsel declined it, unless his Honor would make an order that his answer should be read upon the trial.

Where it is oath against oath, and an issue thereupon directed to ..., the court will order the defendant's answer to be read at law, as it is a means of trying by the jury the credit of the witness and of the party.

Two cases were mentioned where such an order had been made, one in 2 *Vern.* 554. *Ibbetson* versus *Rhodes*, and likewise reported in *Eq. Cas. Abr.* 229. There the defendant denied notice of the plaintiff's title; the plaintiff proved it by one witness; Lord *Cowper* directed it to be tried at law, but that the plaintiff should admit the defendant's answer to be read at the trial, not as evidence, for that, he said, it could not be, nor should they admit it to be true, but so that the defendant might have the benefit of his oath at law, as in this court, if it would weigh any thing with the jury; the other case was before Lord *Hardwicke* ... oath against oath only; the answer was directed to be read at the trial, and the reason is, because it is a means of trying by the jury the credit of the witness and the party.

In the present case, his Honor said, it does not rest singly upon the oath of the witness, for several circumstances confirm

Where it does not rest singly on the witness's oath, but circumstances corroborate what he swears, the court would not direct the defendant's answer should be read at law.

(1) *Walton* v. *Hobbs*, *ante* 2 vol. 19.

(2) Assigned all his effects to one *Daniel*, for the benefit of his creditors. *Daniel* made the agreement alluded to with the *defendant*, which was indorsed on the bond to this effect: that *Daniel* would pay him a composition of 29 *l.* as soon as he could receive it from the estate and effects of *Dyer*. This agreement was signed by *Daniel*. But the defendant denied that he acceded to the agreement as stated in the indorsement: but that he entered into it upon condition, that *Daniel* would undertake to pay the 29 *l.* *absolutely*. The defendant had afterwards obtained a judgment upon his bond.

Only v. Walker.

and corroborate what he swears, and therefore is not within the rule of these cases, and consequently he could not give any directions here, that the answer of the defendant should be read at law.

The defendant refusing to try it upon any other terms, his Honor decreed the agreement to be carried into execution by the defendant's delivering up his bond to the plaintiff, on payment of the 29 *l.* the sum he had agreed to take in composition for his debt, and gave no costs of either side (1).

(1) And his Honor decreed, that the defendant should enter up satisfaction on his judgment. *Reg. Lib. B.* 1745. fol. 424.

Case 143. *Dobbins* versus *Bowman*, *Michaelmas Term*, 1746.

H. R. suffers a recovery, and declares it shall enure to the use of himself, his heirs and assigns, *and* to such uses, &c. as by his will, &c. he should appoint; the word *and* may be understood disjunctively for the word *or*, to satisfy the intention of the testator, who by his will appointed the recovery should enure to the use of *J. C.* and *J. D.* and their heirs, on trust, &c.

HENRY REYNALLS covenants to suffer a recovery, and declares that such recovery should be and enure to the use and behoof of himself, his heirs and assigns; *and to* and for such uses, intents and purposes, as by his last will, or by any instrument in writing by him duly executed, he should limit and appoint.

The recovery was suffered.

[409] *Henry Reynalls* by will (reciting the deed and recovery) in pursuance and execution of, and according to the power reserved to him by the said deed, and by virtue thereof, and of all other powers and authorities belonging to him in that behalf, limits and appoints, that the said recovery so by him suffered, shall enure to the use of *James Clitherow* and *Joseph Dobbins*, and their heirs, upon trust, &c.

It was argued by Mr. *Wilbraham*, that a use could not be limited upon a use; and as it was declared that the recovery should enure to the use of the covenantor, his heirs and assigns, that this subsequent limitation was void, and consequently that he had no power to limit any uses by his will, and as the will was intended to operate as an execution of a power which he had not, and there were no devising words to pass the estate as owner, that the estate was not vested in *Clitherow* and *Dobbins*.

Lord Chancellor,

It is certain that a use cannot be limited upon a use, but I think the word *and* must be understood disjunctively for the word *or*, which is frequently done to comply with the intention of parties (1); but if it was to be understood conjunctively, I think the will would be sufficient to pass the estate to *Clitherow* and *Dobbins*.

(1) *Vide Read* v. *Snell*, *ante* 2 vol. 645.

For

For in a will there are no particular words required to pass the estate, but any words that shew the intention of the testator are sufficient, and the words in this will plainly manifest that the testator intended that *Clitherow* and *Dobbins* should have the estate upon the trusts of the will.

Any words in a will that are sufficient to shew the intention of a testator, are sufficient to pass an estate.

Jerningham versus *Glass*, *January* 24, 1746. Case 144.

S. C. Amb. 64. Where a wife is executrix of a former husband, the court will grant a *ne exeat regno* against her alone, if her second husband should be gone out of the kingdom.

A Motion was made for *ne exeat regno*, against the wife of *Glass*, who was executrix of her former husband; *Glass* was already gone out of the kingdom, and it was doubted by *Lord Chancellor*, whether it could be granted, as she was a *feme covert*, and could give no security; and it was adjourned to this day to search for precedents.

LORD CHANCELLOR,

One precedent has been produced to me of *Moore* versus *Meynell*, *May* 8, 1719. There a bill was brought against baron and feme, who was executrix of her former husband; the husband and wife both resided at *Antigua*; the wife returned into *England* alone, and an order had been obtained from Lord *Cowper* for a *ne exeat regno* against the wife; she this day moved Lord *Macclesfield* to discharge the order, as she was *a feme covert*; but he rejected the motion, and afterwards she put in her answer, and then moved the court again to discharge the order; but the court a second time rejected the motion, unless she would give security to abide the event of the account. [410]

Upon this precedent, his Lordship granted the motion in the present case (1).

(1) *Reg. Lib. A.* 1746. fol. 155.

White versus *Sansom*, *February* 9, 1746. Case 145.

N. the mother of *A. S.* was seised in tail *ex provisione viri* of the estate in question, reversion in fee to her husband, *A. S.* and *W. S* her husband created a mortgage term of 1000 years on his estate, and joined in levying a fine to the mortgagee, remainder to such uses as *W. S.* should appoint. *W. S.* before the levying the fine, on sale of an estate belonging to him, covenants with *J. S.* the purchaser for quiet enjoyment, and afterwards makes an appointment to trustees for particular purposes of the wife's estate. *J. S.* being evicted of the lands he purchased, brings his bill against *A. S.* and her four children, to subject her estate to the plaintiff's demand under the covenant of *W. S.* *It being a doubtful case whether the plaintiff's debt accrued by breach of covenant, till after the appointment of* W. S. *in execution of the power*, Lord Hardwicke *dismissed his bill.*

MRS. *Neale*, the mother of the defendant *Ann Sansom*, widow of *William Sansom*, was seised in tail *ex provisione viri* of the premisses in question, reversion in fee to her husband: *Ann* and *William Sansom* in his life-time, created a mortgage term on this estate of 1000 years; Mrs. *Neale* joins in levying a fine to the use of the mortgagee, the remainder to such uses, and in such shares and proportions, as *William Sansom* should appoint, and in default of such appointment, to the use of the husband *William Sansom* and his heirs; and the consider-

White v. Sansom.

ations recited are for the barring all estates-tail, and settling the premisses to the uses after mentioned.

The husband, before the levying the fine, on sale of an estate, covenants with *J. S.* the purchaser, for quiet enjoyment; afterwards, in 1742, he makes an appointment to trustees, in the first place, by sale of the wife's estate, to raise money, and pay the principal and interest of the mortgage, and the residue in pursuance of the power, for the benefit of his wife and children.

J. S. is evicted of the lands he purchased; *William Sansom* dies, leaving his widow *Ann Sansom* and four children; then Mrs. *Neale*, the mother of the defendant *Ann Sansom* the wife, dies, and this bill was brought by *J. S.* against the wife and children of *William Sansom*, to subject the premisses in question to the plaintiff's demand, under the husband's covenant.

Mr. *Talbot*, for the plaintiff, cited *Shirley* versus *Ferrars*, before Lord *Talbot*, and *Baynton* versus *Ward*, before Lord *Hardwicke*, *April* 24, 1741. (1).

Mr. *Huet*, for the defendant, cited Sir *Edward Clere*'s case, *Co. Rep.* 6, 17. *b.*

[411] Lord Chancellor,

I think the plaintiff has a right to come here, for the mortgage term standing out is a sufficient ground for so doing; and there are cases where, though even at law it would be deemed fraudulent, yet notwithstanding they may come here for the sake of further relief.

And so far I am of opinion for the plaintiff.

As to the question, whether this appointment may be considered as fraudulent against creditors, it has been said, that tho' it arises under an appointment, yet by the plaintiff's counsel the whole estate would be considered at law as derived under the fine, and esteemed as a fraudulent conveyance within the statute.

For the words of the statute, it was said, are not confined expressly to the estate of the grantor, but makes void every alienation by which creditors may be defrauded.

And that what has been done here amounts to an alienation; for whether it is taken as the estate of the husband or of the wife, or derived under the fine, it is still an alienation.

That the husband had a power over it with a reversion, so that it is a power over his own estate: and if he had not aliened the reversion it would have been assets, so that it is an alienation to the prejudice of creditors; and if held otherwise, it would be easy to defraud creditors, merely by a different method of conveyancing.

That it was not a bare naked power, but an ownership, and therefore is an alienation to the prejudice of creditors.

There has been another question started, that here the mother of *Ann Sansom*, and grandmother of the rest of the defendants, was tenant in tail with reversion in fee to herself, and being so *ex provisione viri*, *Ann Sansom* had no power to alien, the mother dying after the death of *William Sansom*; and though the fine

(1) Ante 2 vol. 172. S. C. See the cases referred to in the note there.

would

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would be a bar by the statute of the estate-tail, when it is descended, yet as to the reversion in fee, if it was in the mother, it could only be by way of estoppel; and if this had been the case, I should have been of opinion, that this estate would not have passed to the husband *William Sansom* so as to be his assets, because there was nothing descended to the defendant *Ann Sansom* at the time of the fine, and therefore could make no conveyance of it.

[412]

But that is not the case, for the reversion in fee is to Mrs. *Neale's* husband, and consequently in the defendant *Ann Sansom*, the only child of Mr. *Neal*.

But still I am of opinion that this would not be a fraudulent conveyance at law, and if it was so held, would be an extreme hard case.

This was the entire estate of the wife, who joins with her husband in raising a mortgage term (*ut supra*) with a power of appointing to the husband in such parts and proportions, &c. (which seems to have an eye to some family settlement hereafter to be made, though I lay no stress on that), and in default of appointment to the husband and his heirs.

The trust created by the husband of the wife's estate would not at law have been deemed fraudulent against creditors, nor even against a subsequent purchaser; and if so, this court will not carry it further.

Voluntary conveyances in general are held fraudulent against purchasers.

Nothing therefore could be more just than for the husband to provide for his wife and children out of her estate, and the first trust is to sell the estate, and raise two hundred pounds to pay off the mortgage, which trust could never at law be called fraudulent; and if so, that would extend itself over the whole, for the provision of the wife and children is out of the surplus, so that at law they would not deem it fraudulent against creditors; nay, even against a subsequent purchaser, which is stronger, because I hardly know an instance where a voluntary conveyance has not been held fraudulent against a subsequent purchaser (1).

If not fraudulent at law, what ground is there for this court to carry it further.

I agree, if the law would deem it fraudulent, this court would assist in removing the mortgage term out of the way.

But here is another circumstance, for the plaintiff's debt does not appear to have accrued by breach of covenant till after the conveyance in execution of the power.

I have heard it said in this court, that there are reasonable voluntary settlements, which they will not interpose to disturb upon the construction of these statutes (2).

There are words in the proviso of the statute, which seem to admit such construction, 13 *Eliz. c.* 5. *sec.* 4. "Provided always, and be it enacted, &c. that whereas sundry common "recoveries of lands, &c. have heretofore been had, and may "hereafter be had, against tenant in tail, &c. the reversion or "remainder, &c. then being in any other person, &c. that every

(1) See *Doe* v. *Routledge*, *Cowp.* 705. and *Oxley* v. *Lee*, *ante* 1 vol. 625.

(2) *Vide Russell* v. *Hammond*, *ante* 1 vol. 15. and the cases there cited.

 "such

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"such common recovery, &c. shall, as touching such person "which then had any remainder, &c. and against the heirs of "every of them, stand, remain and be of such like force, as if "this act had never been made."

As it is a doubtful case, whether the plaintiff's debt accrued till after the conveyance in execution of the power, I must dismiss the bill, but it shall be without costs; and decreed accordingly.

Case 146. *Maynwaring* v. *Maynwaring and Lee, February* 11, 1746.

A. conveyed 1000*l.* to trustees to be laid out in the purchase of freehold land within 22 computed miles of *Chester*. The plaintiff, the first tenant in tail under a limitation from *A.* suggesting no such purchase as the deed directs can be found, but a convenient one might be had in *Lancashire*, prayed that the trustee might be directed to purchase accordingly. *Lord Hardwicke made an order for the trustee to look out for a purchase within the terms of the deed, and if after a convenient time allowed, it should appear no such purchase is to be met with, said, he should be inclined to deviate in this particular from the strict terms of the trust.*

A. By deed conveys the sum of 1000*l.* to trustees, to be laid out in the purchase of freehold land within 22 computed miles of *West Chester*, and after limiting the estate to several persons for life, gives the first remainder in tail to the plaintiff, who is now of age, and the last remainder-man is the defendant *Lee*.

It being convenient for the first tenant in tail, that it should be immediately invested in land, that he may be enabled to suffer a recovery, and bar the subsequent remainders, he (1) brings his bill against the trustee of the deed, and the last remainder-man suggesting that the trustee has been endeavouring to find out such a purchase as the deed directs, but no such is to be found, and that a very convenient purchase may be made in the county of *Lancaster*, and prays the trustee may be directed to purchase accordingly.

The trustee by his answer submits to the court, that he is tied up by the terms of the trust, and cannot safely purchase any where but within the limits prescribed him.

It was said by the plaintiff's counsel, that the defendant *Lee*, the last remainder-man, endeavours to hinder and entangle the affair as much as possible, in order to prevent his contingency from being barred; and that as the laying out the money in a purchase within 22 miles of *Chester*, was a circumstance only, and not essential at all to the rights of the parties, the court might dispense with it; and that this court has in the cases of wills (where the testator has directed a purchase of freehold to be made) allowed the trustees to purchase, notwithstanding part has been copyhold, where the freehold cannot be had without it.

(1) And the tenants for lives (who were his father and mother) bring their bill, &c.

LORD

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LORD CHANCELLOR,

As the words of the deed are not directory only to the trustees, with respect to the purchasing of the estate within 22 miles of *Chester*, but incorporated with the very trust itself, I cannot deviate from the intention of the donor under the deed, nor is the court to pay any regard to the convenience of the first tenant in tail and his family, or to the difficulties the last remainder-man may create in order to prevent his interest from being barred (1), but the trustee might have borrowed some estate within this district (2), for the purpose of investing the money in land, and after the end was answered to the first remainder-man in tail of suffering a recovery in order to get the money into his own hands, the estate might have been restored again to the original owner.

The trustee might have borrowed some estate within the 22 miles of W. C. for the purpose of investing the money in land, and after the end of suffering a recovery in order to get the 1000*l.* was answered to the first tenant in tail, it might have been restored again to the original owner.

I can do nothing more in this case, than direct the trustee to look out for a purchase within the terms of the deed, and if after a convenient time allowed for that purpose it should appear no such purchase is to be met with, the parties may apply to the court (3), who would then be inclined to deviate in this particular from the strict terms of the trust, and in the mean while ordered a search to be made for precedents of the court's dispensing with such a trust, where after a proper time allowed no such purchase is to be found.

But as to what has been mentioned with regard to the court's allowing of a purchase where the estate has been part copyhold, it has been in such cases, where it was merely directory, and not incorporated with the very trust itself,

N. B. Lord Chancellor made such an order in the cause of *Gosselin & al'* versus *Dodwell & al'*, where Sir *William Dodwell* by his will directed his trustees to lay out a sum of money in the purchase of freehold land only, and yet upon a petition of the trustees, suggesting that they could not without great disadvantage purchase the freehold of an estate unless they took along with it a college-holding, his Lordship dispensed with the strict directions of the will, and approved of the trustees purchasing the college-holding at the same time with the freehold.

Sir W. D. by his will directed his trustees to lay out a sum of money in the purchase of freehold land only, as they could not without great disadvantage purchase the freehold of an estate, unless they took along with it a college-holding, the court dispensed with the strict directions of the ...

(1) *Vide Collet* v. *Collet, ante* 1 vol. 11. and the cases there cited.

(2) This is sometimes done, where money is directed to be laid out in land for the benefit of a *feme covert*, in order that she may be enabled to dispose thereof by fine. *Vide Oldham* v. *Hughes, ante* 2 vol. 453.

(3) *Reg. Lib. B.* 1746. fol. 302.

Case 147. *Hamond and others, Assignees of Myers a Bankrupt,* versus *Myers and Murray, Feb.* 16, 1746. *at the Rolls.*

The assignees under a commission of bankruptcy brought a bill to set aside an assignment of an annuity from the bankrupt to *M.* a being made for no consideration, and, as an evidence of the fraud, offered to read the examination of *M*'s attorney, taken before the commissioners; the court would not admit it, unless he had been examined in chief in the cause.

THE bill was brought against the defendant *Murray* to set aside a fraudulent assignment of an annuity from *Myers* to *Murray*, as being made for no consideration, and subsequent to an act of bankruptcy.

The plaintiff's counsel offered to read the examination of *Boson*, the defendant *Murray*'s attorney, taken before the commissioners, who acted in the commission against *Myers*, as an evidence of the fraud, and of an act of bankruptcy by *Myers*, previous to the assignment of the annuity to *Murray*.

Master of the Rolls. I cannot allow the examination of *Boson* to be read to affect the interest of a third person, and am of opinion the plaintiff could not be intitled to this evidence, unless *Boson* had been examined in chief in the cause.

M. having by his answer set up a different right to the annuity than what he had done in his examination before the commissioners, the court allowed the latter to be read to shew the uncertainty.

But his Honor permitted the plaintiff to read the examination of the defendant *Murray* taken before the commissioners, because the answer having set up a different right to the annuity from what he had before insisted on in his examination, the examination may in such a case be read to shew the contrariety and inconsistence between the answer of the defendant *Murray*, and his examination taken before the commissioners.

Case 148. [416] *February* 20, 1746, *Lyon and Lady Catharine his Wife, one of the Daughters of the late Marquis of Carnarvon, by Lady Catherine, now Marchioness Dowager of Ca* — Plaintiffs,
The Duke of Chandos and Others, Defendants.

On a settlement previous to a marriage, the trust of a term was, in case the husband should have no issue male, and there should be issue daughters, &c. to raise, if two daughters 25000 *l.* to be paid to them when they attain 21, or are married, but not to be raised till after the death of their grandfather. The father died and left issue two daughters only, the grandfather since is dead; the bill is brought by the plaintiff in the right of his wife, one of the daughters, for 12,500 *l.* with interest for the same from the time of the marriage. *Lord Hardwicke held the portion vested on the marriage upon the words of the settlement, and that interest was due from the time of the marriage.*

IN a settlement made previous to the marriage of the late Marquis of *Carnarvon*, there was a term of 1000 years created, which was declared to be "upon trust in case the Marquis "should have no issue male by Lady *Catharine Talmash*, and that "there should be issue a daughter or daughters, then the trus-"tees should out of the profits of the manors, &c. or by sale, "mortgage, or other disposition thereof, for the term of 1000 years, raise for the portion of such daughter or daughters, if

"one,

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" one, 15,000*l.* if two, 25,000*l.* to be paid to such daughter " or daughters when they should respectively attain 21 years, " or be married, which should first happen."

By the settlement, a maintenance was provided for the daughters of the marriage, but not to be raised till after the death of the late Duke of *Chandos*.

The Marquis of *Carnarvon* died three years after the marriage without issue male, and left two daughters, the plaintiff Lady *Catharine*, and Lady *Jane Bridget*.

On the 10th of *January* 1743, the plaintiffs intermarried, and thereupon Mr. *Lyon*, in the right of Lady *Catharine*, became intitled under the settlement above mentioned to the sum of 12,500*l.* and they have brought their bill for this sum, with interest for the same from the time of the marriage.

Upon the 9th of *August* 1744, the late duke of *Chandos* died.

Lord Chancellor upon the opening of the case for the plaintiffs thought it very strong in their favour, and therefore put it upon the defendant's counsel to state their objections.

Mr. *Brown*, counsel for the defendants, insisted, as this is a reversionary term, that did not take effect in possession till after the death of the Duke of *Chandos*, and therefore the plaintiffs were not intitled to the portion or interest thereon in his life-time; and cited the case of *Brome* versus *Berkley*, 2 *P. Wms.* 484. [417]

In the present case the same circumstance as in that, an intervening estate for life in the late Duke of *Chandos* which did not drop till several months after the marriage, and the portion too directed to be raised out of the rents and profits, which seems to shew the intention of the parties that no interest should be paid till after the death of the Duke, as he was, during his life, intitled to the rents of the estate charged with the portion.

Mr. *Noel* of the same side said, the settlement directs that the m[illegible]ce of the daughters shall not be raised till after the death of th[illegible]te Duke; and therefore it cannot be presumed the part[illegible]d the capital of the portion should be raised till the term [illegible]t in possession by the death of the late Duke; he cited [illegible]rsus *Evelyn*, 2 *P. Wms.* 591. to shew, that tho' no tim[illegible]ed for payment of the portion, yet the court would not raise [illegible] reversionary term, as the daughters were so very young.

LORD C[illegible]NCELLOR,

I am in general extremely unwilling to exercise the authority of this court in raising portions or interest upon them out of reversionary terms, and therefore wherever cases have been brought before me to raise them upon construction or implication only, I have always refused to do it (1).

The court will reluctantly raise [illegible] interest upon them out of reversionary terms, especially upon construction or implication only.

But in the present case the trust of the term is so penned, that I cannot avoid decreeing it to be raised.

Upon the first part of the term the great objection is, that this is to be raised out of a reversionary one.

(1) *Vide Stanley* v. *Stanley*, *ante* 1 vol. 549. and references. *Stephens* v. *Dethick*, *ante* 39.

It

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It is plainly put in the power of the Marquis of *Carnarvon* the father, to raise it out of the reversionary term, if he thought proper; if the Marquis had died, and the Duke of *Chandos*, it is not controverted on the wording of this settlement, but that the trustees might raise it even in the life-time of the jointress.

Then the only question is, Whether it could be raised in the life-time of the late Duke of *Chandos*?

[418] It has been insisted, that though there are no words to suspend it, yet, *by implication*, the raising of the portion ought to be postponed till his death, by the rules of the court.

But what warrant has the court to insert, *by implication and construction*, what the parties themselves have not expressed; for, as they have said, it may be raised in the life-time of the Marquis and jointress, and have said nothing to suspend it till after the death of the Duke; *expressio unius est exclusio alterius*.

It makes it stronger too, when, in the very next clause, the parties had in contemplation the death of the Duke of *Chandos*.

An argument was drawn in favour of the defendants from the clause relating to maintenance, which is not to be raised till after the death of the late Duke, and supported by the case of *Brome* versus *Berkley*.

It was said that *maintenance* does, in its nature, precede the portion, and as it is not to be raised in the life-time of the Duke, therefore the portion shall not.

In that case there were no words to govern the construction, but in this there are express words that do govern it, and intirely distinguishable from the case of *Brome* and *Berkley*, because there is no power there of raising it in the life-time of the jointress *.

Though it is not usual for conveyancers, and they are extremely cautious of raising portions for daughters in the father's life-time without his consent; yet where there are great estates, it is common to direct that upon the death of the father the portions for the daughters shall be raised in the life-time of the grandfather, and not suspend the raising them till after two lives.

To construe this settlement otherwise, I must insert words, and go *by implication* only, when there is an express direction to raise it even in the life-time of the Marquis himself, if he thought fit.

I am of opinion, therefore, the portion vested on the marriage of Lady *Catherine*, from the words of the settlement, and [419] that interest was due from the time of the marriage; and his Lordship decreed it to be raised at 4 *l. per cent.* accordingly.

* Upon a mariage settlement lands are limited to the use of the husband and wife for their lives, remainder to the first and every other son in tail, and in default of issue male of the marriage, to trustees, in trust to raise 2500 *l.* for daughters payable at 21, or marriage, which shall first happen, and out of the profits to pay 100 *l. per ann.* for maintenance; the first payment of the maintenance to commence after the estate of the trustees shall have come into possession: the husband dies without issue male, leaving a daughter, and a wife who is jointured, in the premisses; the portion shall not be raised in the mother's life-time, because the maintenance, which is naturally to precede the portion, is not to be paid till the trustees are in possession. *Browne* versus *Berkley*, 2 *P. Wms.* 484 (1).

(1) *Vide Corbet* v. *Maidwell*, 1 *Salk.* 159.

Lee versus *Cox and D'Aranda*, *February*, 23, 1746. Case 149.

THE question in this cause arose upon the covenants in a deed previous to the marriage of the defendant *Martha Cox* with her first husband *Charles Henry Lee*.

S. C. 1 Ver. 1. *L.* previous to his marriage with *D.* covenanted that he would by will, or by some good assurance in the law, grant to *D.* or *E. D.* the mother, or her executors, &c. in trust for *D.* and for her separate use, 1000 *l.* to be paid to *D.* after his decease; and in case he should not by will or otherwise assure to *D.* the 1000 *l.* then his executors, &c. shall within six months after his decease pay *D.* the 1000 *l.* *L.* is dead without making any will or deed in regard to the 1000 *l.* *D.* *is not intitled to the* 1000 l. *and the distributive share likewise of L's personal estate, being meant only to secure a provision for the wife, without any intention of the husband to leave it as a debt* (1).

"In consideration of the intended marriage, and of the mar-"riage portion of *Martha D'Aranda*, and for making a provi-"sion for the said *Martha*, *Charles Henry Lee* doth covenant "that he will in his life-time, either by his last will or by some "good and sufficient assurance in the law, grant to *Martha* or *Eli-*"*zabeth D'Aranda* the mother, or her executors or administra-"tors, in trust for the said *Martha*, and for her sole and sepa-"rate use, 1000 *l.* to be paid to the said *Martha*, after the decease "of *Charles Henry Lee*, in case she shall survive him."

"And in case *Charles Henry Lee*, shall not, by will or other-"wise in his life-time, assure to *Martha* the said 1000 *l.* that then "the executors or administrators of *Charles Henry Lee*, shall, "within the space of six months next after the decease of *Charles* "*Henry Lee*, pay to *Martha D'Aranda* the sum of 1000 *l.* to and "for her own use and benefit."

Mr. *Lee* is dead, without making any will or deed; in pursuance of his power with regard to the 1000 *l.*

Mr. Solicitor General for the plaintiffs, the children (2) of the defendant *Martha Cox* by her first husband, insisted, that as he knew he should leave sufficient to pay 1000 *l.* she shall not have both the 1000 *l.* and her share of his personal estate under the statute of distributions.

That the court always leans against double provisions.

He cited *Wilcocks* versus *Wilcocks*, 2 *Vern.* 558. *A.* covenants on his marriage to purchase lands of 200 *l.* a year, and settle them for the jointure of his wife, and to the first and other sons of the marriage; he purchases lands of that value, but makes no settlement, and on his death the lands descend on the eldest son; [420] on a bill brought by him for a specific performance, Lord *Cowper* decreed the lands descended to be a satisfaction of the covenant.

(1) *Vide Blandy* v. *Widmore*, 1 P. W. 324. and Mr. *Cox's* note thereto. *Barret* v. *Beckford*, 1 *Ves.* 519. *Weyland* v. *Weyland*, *ante* 2 vol. 632. *Kirkman* v. *Kirkman*, 2 *Bro. Cha. Rep.* 95. With respect to cases upon *satisfaction* of *portions* and *legacies*, *Vide Bellasis* v. *Uthwatt*, *ante* 1 vol. 426, and the note.

(2) The plaintiffs were the brother and sister of Mr. *Lee*, he having died without issue.

Lee v. Cox. This is a case of real estate, but *Blandy* versus *Widmore*, 2 *Vern.* 709. and 1 *P. Wms.* 324. is of personal estate; One covenants to leave his wife 650*l.* he dies intestate, and the wife's share on the statute of distributions comes to more than the 650*l.* this is a satisfaction.

The personal estate in the present case amounting to 2300*l.* is more than sufficient to satisfy the covenant in the deed, and therefore shall be deemed a satisfaction; and the case of *Blandy* versus *Widmore* is in point, for either the husband in his life-time, or his executors or administrators, might pay; so that the covenants are not broken by the husband's dying intestate, as his administrator may within six months perform.

Mr. Attorney General for the defendant Mrs. *Cox*.

The rule upon the statute of distributions is, that the debts must be first taken out, before the clear personal estate can be seen.

Is there any ground to say, that the husband did intend she should not have the distribution which he knew the law would give her?

There is nothing upon the face of the deed to exclude her: the contract does not mention the case of an intestacy, but if the husband should not direct it to be raised, considers it as a debt, and she may claim her distributive share of his personal estate in another right *under the statute of distributions*.

He cited the case of *Oliver* versus *Brickland*, *December* 3, 1732 (1), before Sir *Joseph Jekyll*, where the provision for a wife, and a distributory share of the husband's personal estate, were decreed to her.

In *Blandy* versus *Widmore*, the wife was administratrix herself, and could immediately apply the personal estate of her husband, but the defendant *D'Aranda*, the mother of the defendant *Cox*, is administratrix here *durante minore ætate* of her daughter, and therefore the personal estate could not be applied till a twelve month after the intestate's death.

Mr. *Brown* counsel of the same side.

The husband's leaving it to the administrator to pay is not a performance of the covenant, but a neglect in him, because it would have been much more beneficial if he had raised it in [421] his life-time, as it would have been to her separate use, distinct from her second husband, the event which has actually happened.

If the administratrix here was at liberty to pay within six months it would be like the case of *Blandy* versus *Widmore*; but as it cannot be paid till after the six months are expired, it is a breach of the covenant, and she ought therefore to have both.

Lord Chancellor,

I am of opinion upon the strength of the authorities which have been cited, that the defendant *Martha Cox* is not intitled to the 1000*l.* and the distributive share likewise of *Charles Henry Lee*'s personal estate.

I am

(1) 1 *Vez.* 1 S. C. cited.

I am of this opinion too from the reaſoning of the thing: It is natural to think this was only to ſecure a proviſion to the wife, without any intention of the huſband to leave it as a debt. Lee v. Cox.

I go likewiſe upon the foundation of the court's leaning againſt double proviſions, and double ſatisfactions, in ſuch a caſe they conſider the intention of the parties; for where it is left to ariſe out of his eſtate after his death, and meant only to ſecure a proviſion for the wife, the court will regard it in no other light.

There have been caſes that are ſtronger, where the court has conſidered as a ſatisfaction for a debt to an eldeſt ſon a proviſion for him out of real eſtate, and would not draw out of the perſonal eſtate to the prejudice of the widow, and younger children, a ſum of money which would be a double proviſion for ſuch eldeſt ſon, and this was the ground of the determination in the caſe of *Wilcox* verſus *Wilcox*.

The court have conſidered a proviſion out of real eſtate as a ſatisfaction for a debt to an eldeſt ſon, and not drawn a ſum out of the perſonal eſtate, which would be a double proviſion for him, to the prejudice of younger children.

The counſel for the defendant Mrs. *Cox* obſerved upon the covenants, that the original intention was the huſband ſhould in his life-time ſet apart this proviſion for the wife.

If there were any words in the deed which confined it to this ſenſe, it would be very ſtrong in favour of the wife, becauſe at his death it would then have been a breach of the covenant, and within the caſe cited by Mr. Attorney General.

But the covenant is not ſo, for it is a power of leaving it by will, or letting her take it out of his eſtate after his death.

In caſe Charles Henry Lee ſhall not by will or otherwiſe in his life-time aſſure to Martha one thouſand pounds, that then the executors or adminiſtrators of Charles Henry Lee ſhall, &c. (*Vide the words before.*)

There is no breach of the covenant therefore, and no obligation on the huſband to perform it in his life-time, and he has left a perſonal eſtate more than ſufficient to ſatisfy the 1000*l.* [422]

Is this then a ſatisfaction? I am of opinion it is; and it has often been ſaid, that the ſtatute of diſtributions, is *the legiſlature's* making a will for a man, if he makes none for himſelf.

The ſtatute of diſtributions is the legiſlature's making a will for a man, if he makes none for himſelf.

The caſe of *Blandy* verſus *Widmore* is exactly in point, and though more fully ſtated in 1 *P. Wms.* yet it is to the ſame effect in *Vern.* Lord *Cowper* took the covenant not to be broken, becauſe the wife was adminiſtratrix, and had it in her power to pay herſelf.

The material thing too in the preſent caſe is, that the covenant was not broken at the huſband's death.

It has been ſaid that the perſonal eſtate need not be diſtributed till a twelve month after the huſband's death; no more it need not, but the adminiſtratrix might notwithſtanding have paid the 1000*l.* if ſhe pleaſed, within ſix months.

It has alſo been ſaid, the defendant *Cox* not being of age, the mother has taken adminiſtration *durante minore ætate*, and there-fore

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fore differs from *Blandy* versus *Widmore*, because the defendant *Cox* cannot pay herself as she is not administratrix.

Tho' the mother took out administration during her daughter's minority, yet the moment she comes to the age of *seventeen* she is *ipso facto* administratrix, and so considered by relation from the beginning.

But the defendant *D'Aranda*, the mother of the defendant *Cox*, took out administration as guardian only during her daughter's minority, and from the moment the daughter comes to the age of *seventeen* she is *ipso facto* administratrix, and is so considered by relation from the beginning, and consequently is not distinguishable from *Blandy* versus *Widmore*.

As to the case before Sir *Joseph Jekyll* it is clearly distinguishable; for there the covenant was to lay out a sum of money as a provision for the wife in two years in the life-time of the husband; the two years lapsed without any thing done of that kind, and therefore was a plain breach of the covenant.

Whether *Blandy* versus *Widmore* be properly stated or not in *Vernon*, yet this is truly within the reasoning of that case, and it would be the strangest thing in the world for a court of equity to determine upon such nice distinctions, and very slight arguments, which would never stand with the reason of mankind without doors.

Lord *Hardwicke* declared, that the defendant *Martha Cox* is not intitled (1) to a distributory share of her husband's personal estate, in case it shall amount to more than the sum of 1000*l*.

(1) To the said 1000*l* by virtue of the said marriage articles as a debt out of the said intestate's estate, and also to a distributory share of her husband's personal estate, in case it shall amount to or be more than the sum of 1000*l* *Reg. Lib* B. 1746, fol 359

Case 150. *Steadman* versus *Palling*, *February* 27, 1746.

[423]

A bill brought after an acquiescence of five years, and after a mother's death against her representative, to set releases aside, as unduly obtained by her, and for an account of his father's and grandmother's estates, and to be paid his full share thereof: *The procuring releases from a person immediately upon his coming of age is always a circumstance to create a just use of unfairness, but as there is no particular imposition charged through means of the defendant, the court would not determine the question as to the unfairness of the releases, till the Master has taken the account of the father's personal estate only.*

THE plaintiff's grandfather by his will gave to the plaintiff's late mother, then the wife of *Thomas Steadman*, and her heirs, several houses in *Yarmouth*; in 1721, *Thomas Steadman*, the plaintiff's father, died intestate, leaving *Elizabeth* his widow, and the plaintiff and *Elizabeth Steadman* his only children very young; the mother took out administration, and being seised of such real estate, and possessed as administratrix also of a considerable personal estate, in 1728, she married the defendant *William Palling*; on the 30th of *August*, 1728, articles of agreement were entered into between the defendant and the plaintiff's mother, whereby *Elizabeth Steadman* "did "give and grant unto *William Palling* during her natural life, "the interest of all her money, and the rents of all her estates, "and this for the maintaining the house, and educating our "children, until *Thomas Steadman* and *Elizabeth Steadman*, son "and daughter of the above *Elizabeth Steadman*, shall come of "full age, or be married, which shall happen first, then the

"said *Thomas* or *Elizabeth* shall receive their just portions of money "or estates as is or shall be due to them *as lawful heir to their* "*father*; but if it should so happen that the said *Elizabeth Stead-* "*man* should die before the above children come to their several "fortunes, then she may dispose of all her estates and fortunes "as the said *Elizabeth* shall think proper." STEADMAN v. PALLING.

At the begining of the articles *Elizabeth Steadman* agreed to pay to *William Palling* five hundred pounds on the day of marriage for her portion, "which is to remain in the hands of "*William Palling* during his natural life, *and after his decease*, "if there be no heirs lawfully begotten by *William Palling* "upon the body of *Elizabeth Steadman*, then the five hundred "pounds to return to the said *Elizabeth or her heirs* (1), and the "wife is to have no claim to *Palling*'s real estate."

The articles were drawn by the defendant, and of his writing, and the plaintiff's mother took no advice thereon, nor laid them before counsel.

On the 22d of *February*, 1730, the plaintiff's grandmother made her will, and gives to *Elizabeth Palling* (the plaintiff's mother) "all her houshold goods, &c. bonds, mortgages, "securities for money, and all other her personal estate to be "sold and disposed of by such parcels, and at such times, and in "such manner, as she shall think fit, and out of the money "arising by sale thereof to pay her debts, *and the residue thereof* "*she wills shall be equally paid*, and divided, to and between [424] "*Thomas Steadman* and *Elizabeth Steadman* her two grandchildren, "at such time as they shall severally attain their respective age "of 21, *or sooner*, if my daughter shall think fit, and appoints "her sole executrix (2)."

The mother of the plaintiff proved the will, and she and the defendant possessed the testatrix's personal estate; the plaintiff's sister died intestate, and the plaintiff claims a moiety of her personal estate.

The plaintiff came of age on the 10th of *June* 1737, but no inventory was ever exhibited in the ecclesiastical court of his father's personal estate, and no account thereof laid before him by his mother, but she representing that his share amounted to no more than 540 *l.* of his father's personal estate, and to 60 *l.* only of his grandmother's, he was prevailed on ten days after he came of age to sign two several releases to the defendant for the 540 *l.* and the 60 *l.*

Elizabeth, the plaintiff's mother, had five children by the defendant, but they all died under age in her life-time, and in 1742 she died herself.

The bill was brought to set aside the releases as unduly gained, and for an account of the plaintiff's father's and grandmother's personal estate, come to the hands of the plaintiff's late

(1) But if there be any such heirs, then the 500*l.* to remain to them after the defendant's decease.

(2) This will is very shortly stated in the Register's book: The bequest of the residue is thus expressed, "to pay the "clear overplus to the plaintiff, and his "said sister equally *at their respective ages* "*of 21 years*."

mother,

STEADMAN v. PALLING.

mother, and that the defendant may pay the plaintiff his full share thereof, and that the 500*l.* agreed by the articles to return to the plaintiff's mother or her heirs, may be secured for the plaintiff's benefit, and that he may be let into the possession of his mother's real estates.

The defendant insisted, that as he had children by *Elizabeth* born alive, he is by the curtesy of *England* intitled for life as well to the real estate his wife was seised of in fee at the time of the marriage, as to the real estate which after her marriage came to her, and of which she died seised in fee.

He further insisted, that by the articles, the reversionary interest expectant on the defendant's death in the 500*l.* vested in the defendant's children, and that he, as administrator and representative of the last surviving child, is intitled to the principal of the 500*l.*

He insisted too both the releases were executed in the presence of the plaintiff's own attorney, and that the plaintiff acquiesced in the account, and never complained of it till after his mother's death, being above five years, and therefore the account ought not now to be opened.

[425] Mr. Attorney General for the plaintiff insisted he was imposed upon by the defendant, and that the two releases were unduly obtained, and drawing him in to execute them just after he came of age, is such a strong *badge* of fraud, a court of equity will set them aside.

That the articles were drawn by the husband himself, without allowing the wife to consult with any person; and as he has expressly excluded her from *his* real estate; it is therefore natural to suppose, she intended to exculde him from any part of her real estate; and that he cannot in point of law be tenant by the curtesy, because the articles have given him during the coverture the estate of the wife for his life, and she has only a remainder, and a husband can only be tenant by the curtesy of such estate as the wife is seised of in possession at the time of the marriage.

That as to the five hundred pounds, as the deed is drawn inaccurately, by a person not conversant in the law, the court will put such sense upon it as is most agreeable to the intention of the parties; and it cannot be presumed they meant any thing more by the words, *or her heirs*, than her children.

That the plaintiff is intitled to a moiety of his sister's share under the grandmother's will; for he insisted that it was a vested legacy in her at the death of the testatrix, and the time of payment was only postponed to twenty-one, and therefore transmissible to the plaintiff as one of her next of kin.

Mr. Solicitor General for the defendant.

The release was given just after his mother's second marriage, upon an account settled between the plaintiff and his mother, and the defendant very prudently declined meddling with it, as he knew nothing of her first husband's affairs: and the plaintiff's acquiescing all the mother's life-time for five years together, is so

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ſtrong in the defendant's favour, that the court will not oblige him to open the account. STEADMAN v. FALLING.

As to the queſtion, whether the defendant, notwithſtanding the articles, is intitled to be tenant by the curteſy, he ſaid, the articles only intended to ſecure the profits of the wife's real eſtate and intereſt of her perſonal, to maintain the houſe, and educate their children, and therefore both the real and perſonal were blended together as one fund; and there is no proviſo that the huſband ſhall depart from his right, which in conſequence of the marriage he is intitled to by operation of law.

As to the five hundred pounds, the contingency was, *if there ſhall be no children begotten*; but as there were ſeveral children who lived many years, it veſted in them, expectant upon the death of the father, and is ſuch an intereſt as was tranſmiſſible. [426]

But if he is not intitled as their repreſentative, yet the defendant has a juſt claim to it in his own right, for with regard to perſonal eſtate the word *heir* means that perſon who takes for want of the wife's diſpoſition, and that muſt be the defendant, for, as her huſband, he is by the civil law conſidered as the heir, and is the perſon likewiſe who takes under the ſtatute of diſtributions.

As to the queſtion upon the grandmother's will, he inſiſted, according to the rules of the court, the legacies to the plaintiff and his ſiſter did not veſt till twenty-one, for the teſtatrix *eodem ictu* gives and directs the time of payment, for it is not by the words an expreſs gift till twenty-one to the grand-children, being given in the mean time, until they come of age, to their mother.

LORD CHANCELLOR,

There are ſeveral demands compriſed in this bill.

Some relating to the perſonal eſtate of the plaintiff's father, and ſome of his grandmother, and ſome to the real eſtate of his mother, and likewiſe to what he is intitled at the death of the defendant; and this ariſes upon the conſtruction of the articles, which will depend firſt on the plaintiff's equity to be relieved againſt the releaſes given by him at his coming of age.

The caſe ſtands in a good deal of obſcurity with regard to the demand of an account of his father's perſonal eſtate.

The father died in 1727. ſeven years after the widow intermarries with the defendant her ſecond huſband, and articles are entered into at that time.

Nothing more was done till the plaintiff came of age in 1737, when a few days after releaſes are executed, conſequently obtained from him immediately upon his coming of age; this is always a circumſtance which gives the court a ſuſpicion of the unfairneſs of ſuch releaſes (1), and there is no proof at all of any account ſettled at the time, or of any account in writing laid

(1) *Vide Oldin* v. *Samborn, ante* 2 vol. 15.

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before the plaintiff of his father's or grandmother's estates: but only the defendant in the schedule to his answer says, it amounted to a gross sum in the whole of 540 *l.* and 60 *l.*

At the time of the father's death he left a widow and two children; why then was not an inventory kept by the mother [427] his executrix? for it is a great imputation on executors or administrators that no inventory is kept, or account delivered in to children when they come of age.

It is true, with respect to the defendant, there is no particular imposition or fraud charged through his means, for he did not interfere at all, but left it to the plaintiff's mother to settle accounts with him, and the plaintiff besides acquiesced for five years after the releases, and until after his mother's death, without ever making any objections to the fairness of this transaction, which affords a presumption that the plaintiff did not think himself aggrieved.

But it appears doubtful, whether the plaintiff had any allowance for what he was intitled to, on the share of his sister under the grandmother's will.

The latter words relied on in the release, to shew the plaintiff intended to discharge the demand he had in right of his sister, are too general to be applied to this particular demand of the plaintiff, and the release must be confined *secundum subjectam materiem*, and ought not to be extended further.

What I am inclined to do, is to direct the Master to take an account of such parts of the personal estate of the plaintiff's father, as the wife was possessed of at the time of her intermarriage with *William Palling* only, for it would be too hard to extend it as far back as to the death of the first husband; and think it right there should be this inquiry before I set aside *the releases*, for though there are circumstances that induce suspicion, yet are not at all satisfactory to shew there was any fraud in the defendant.

The next question is as to the grandmother's estate, and also in regard to the plaintiff's share as the representative of his sister.

This is a very doubtful point.

If a legacy be devised generally to be paid at 21, and legatee die before, yet it is such a vested interest in the legatee, that the executor may sue for it, and recover it, for it is *debitum in præsenti*, though *solvendum in futuro*.

The rule and distinction is, that if a legacy be devised to one generally, to be paid or payable at the age of twenty one, or any other age, and the legatee die before that age, yet this is such an interest vested in the legatee, that the executor or administrator may sue for and recover it; for it is *debitum in præsenti*, though *solvendum in futuro*, the time being annext to the payment, and not to the legacy itself.

If a legacy be devised to A. at 21, or when he attains 21, and he dies before, it is lapsed.

But if a legacy be devised to a person at twenty-one, or if or when he shall attain the age of twenty-one, and the legatee dies before that age, the legacy is lapsed (1).

It

(1) The distinction between a legacy to A. at 21, or if he attains 21, and one to A. payable at 21, is recognized by many cases. See *Snell* v *Dee*, 2 *Salk.* 415. *Lampen*

STEADMAN v. PALLING.

It has been truly ſaid by the defendant's counſel, that there is no bequeſt made to the grandchildren, but what is contained in the direction of payment.

"The reſidue thereof I will ſhall be equally paid and divided "to and between my two grandchildren at ſuch time as they "ſhall ſeverally attain their reſpective age of twenty-one, *or ſooner*, "*if my daughter ſhall think fit.*"

The reſidue directed to be paid equally between his two grandchildren at ſuch time as they ſeverally attain 21, or ſooner, if his daughter thinks fit; the words, or ſooner, &c. make it a veſted legacy, and tranſmiſſible.

If it had reſted upon the words, *at ſuch time as they ſhall ſeverally attain twenty-one*, I ſhould have been of opinion for the defendant that the legacies did not veſt till then, and that it would have been the ſame thing as if the teſtator had ſaid, I give it them at the age of twenty-one.

But what is the meaning of the teſtatrix's ſaying *or ſooner if my daughter ſhall think fit*, not to hinder the legacies from veſting; but ſhe conſidered her daughter as the natural guardian of her children, and left it to the mother's diſcretion to accelerate it, if ſhe thought proper.

And as the teſtatrix, by the whole tenor of her will, has left the mother a truſtee only for the children, without giving her any power over the capital of the legacies, I am of opinion the legacy veſted in the ſiſter of the plaintiff at the death of the teſtatrix, and tranſmiſſible to him.

As to the point of *tenant by the curteſy*, all the arguments of the huſband's ſtanding ſeiſed for the uſe of the wife under the agreement previous to the marriage, muſt be laid out of the caſe, becauſe it is merely executory, and an agreement to be carried by this court into execution.

"*Elizabeth Steadman* doth give and grant unto *William Palling*, during her natural life, the intereſt of all her money, "and the rents of all her eſtates, and this for the maintaining "the houſe and educating our children until *Thomas Steadman* and *Elizabeth Steadman*, ſon and daughter of the above "*Elizabeth Steadman*, ſhall come of full age, or be married, "&c."

The ſcope and intent of the articles was only to regulate the whole eſtate of the wife, in right of her firſt huſband, as well the produce of the perſonal as rents of the real, for the maintenance of the houſe and education of their children, and the words ſhew it intended to compriſe the ſhare of the wife's

Lampen v. *Clowberry* 2 *Cha. Ca.* 155. 1 *Eq. Ab.* 295. *pl.* 2. note *a*. *Onſlow* v. *South*, 1 *Eq. Ab.* 295. *pl.* 6. *Stapleton* v. *Cheeles*, 2 *Vern.* 673. *Prec. Cha.* 317. S. C. *Anon.* 2 *Vern.* 199. *Pawlet's Caſe.* 2 *Vent.* 366. *Corbett* v. *Palmer*, 2 *Eq. Ab.* 548. *pl.* 27. *Jennings* v. *Looks*, 2 P. W. 277. *Duke of Chandos* v. *Talbot*, 2 *Cox's* P. W. 610. 612. note 1. *Cruſe* v. *Barley*, 3 P. W. 21. *Fonereau* v. *Fonereau*, poſt, 645. *Love* v. *l'Strange* 3 *Bro. P. C.* 337. *Gils* v. *Nelſon*, 1 *Burr* 22. *Rodon* v. *Smith*, *Amb.* 588. *Monkhouſe* v. *Holmes*, 1 *Bro. Cha Rep.* 298. *Fenton* v *Madkſon*, 2 *Bro. Cha Rep.* 75. *Hale* v. *Cox*, 3 *Bro. Cha Rep.* 323. 324. See *Hanson* v *Pail*, ante 2 vol. 125. In *May* v. *Wood*, 3 *Bro. Cha. Rep.* 471. a legacy to two equally to be divided between them, when they ſhall arrive at 24, was held to be veſted.

STEADMAN v. PALLING. children likewise till they arrived at twenty-one, but the estate given to the wife was to determine upon their coming of age.

In short this is nothing more than a contract, in what manner the several funds should be applied of which their estates consisted, and was never intended to abridge the husband's [429] rights by law; and therefore I am of opinion the defendant *William Palling* is intitled to be tenant by the curtesy of the estate his wife was seised of at the time of the marriage, and likewise of the real estate which came to her after the marriage.

As to the 500 *l.* *Elizabeth Steadman* by the articles agreed to pay to *William Palling*, (*vide the words before*).

The first question (in order to determine the meaning) is what the parties understood by the word *heirs*.

Most certainly, they intended children by it throughout the whole articles, for in a former part of the articles, the words *as lawful heirs to their father* are used in this sense.

"And *after his decease, if there be no heirs* lawfully begotten by "*William Palling upon the body of Elizabeth Steadman*, then the "500 *l.* to return to the said *Elizabeth or her heirs*."

What are these heirs of the body? *Children*; and it would make it all void, if I was to construe it according to the legal sense, for that would be heirs *in infinitum*.

The meaning of the words, *after his decease if there be no heirs lawfully begotten*, &c. is, if there be no children in being and existing of their two bodies at the time of the death of *William Palling*, then the 500 *l. to revert to the said Elizabeth or her heirs*.

But the defendant's counsel say, the words *to Elizabeth or her heirs* mean, it should go to *Elizabeth*, if living at the husband's death, but if dead in his life-time, to the husband himself, he being intitled to the wife's effects.

But I am of opinion they use the words, *or her heirs*, in the same sense as when before, they mention them as heirs to the father, and mean children throughout the agreement.

Lord Chancellor made the following order: "First, That "the plaintiff's bill, so far as it seeks to exclude the defend-"ant from being tenant by the curtesy of his late wife's real "estate, and likewise so far as it seeks any account of the de-"fendant's late wife's clothes, which she had at the time of her "death, be dismissed: *And* declared that the plaintiff is intitled "to a moiety of his sister's share of the personal estate of the plain-"tiff's grandmother, after the death of his sister; and it appear-"ing that the share amounted to 60 *l.* his Lordship ordered that [430] "the defendant do pay to the plaintiff 30 *l.* as his moiety there-"of: *And*, as to the relief sought by the plaintiff's bill, to set "aside the release executed by him to the defendant, and his late "wife, administratrix of the plaintiff's father, of his share and "interest in his father's personal estate, either in his own right, "or in right of his sister; *His Lordship* ordered, that it be "referred to a Master, to inquire and take an account of

"what

"what personal estate and effects the plaintiff's mother was possessed of at the time of her intermarriage with the defendant, and the amount thereof at that time. *And his Lordship* declares, that what shall appear she was so possessed of, is to be considered as the produce of the personal estate of the plaintiff's late father, and ordered that the Master do state what was the value of the plaintiff's share thereof, to which he was intitled either in his own right, or as one of the next of kin to his sister. *And* declared, that according to the true intent and meaning of the marriage-agreement between the defendant and his late wife, he is intitled to the interest of 500 *l.* therein mentioned as his late wife's portion, or so much thereof as her share of her late husband's personal estate amounted to during his life, and that after his decease, the principal thereof will belong to the plaintiff; *and* ordered that the Master state how much the defendant's late wife's share of her former husband's personal estate amounted to at the time of the intermarriage between her and the defendant. *And* reserved the consideration of the relief sought by the bill for setting aside the said release, till after the Master's report (1)." STEAR: PAT.

(1) *Reg. Lib.* B. 1746. fol. 550.

Incledon and others versus *Northcote*, *March* 2, 1746 (1). Case 151.

SIR *Henry Northcote*, in 1732, intermarried with the defendant, the only child of Mr. *Stafford*; at the time of the marriage both were under age, and therefore no jointure or settlement were made by the husband, nor had he any portion with the wife, nor any articles entered into; but she was then intitled, under a settlement made by her father on his marriage, to 5000 *l.* to be raised after his death, by virtue of a term of 500 years, vested in trustees, whereof Sir *William Drake* was the survivor, out of part of her father's estate, called the *Stafford* estate, and the defendant, *Lady Northcote*, was also tenant in tail, expectant on the death of her father, in lands whereof her grandfather, by the mother's side, died seised, called the *Kelland estate*.

If a father marries a daughter without requiring a settlement, though it may appear a hardship yet the court can give no relief, for it is established now that a husband may dispose of a wife's term, or the trust of her term, and prevent any thing surviving to the wife.

Mr. *Stafford* being seised of the *Stafford* estate, subject as to part to the term for raising 5000 *l.* mortgaged part of it to *Thomas Troyte* and others for 1000 years, for securing 4000 *l.* in trust for Sir *Thomas Ackland*, then an infant, and charged it afterwards with the further sum of 1300 *l.* making together 5300 *l.* and before he paid any part of the principal sum he died, but by will devised this estate upon trust to be sold, for payment of debts and legacies, and as to what remained unsold, in trust for his daughter in tail, with remainders over. [431]

(1) *Reg. Lib.* A. 1746. fol. 681.

INGLETON v. NORTHCOTE.

Mr. *Stafford*, at his death, was indebted in the sum of 9000 *l.* by bond and otherwise, over and above the 5300 *l.* secured by mortgage, which, with the 5000 *l.* charged on the *Stafford* estate for the defendant's portion, exceeded the value of that estate; whereupon the trustees under his will declining to act, the defendant, and Sir *Henry Northcote*, at her request, (being desirous all her father's debts and legacies should be satisfied) did agree to subject the *Kelland* estate, together with the *Stafford* estate, to the payment thereof, and thereupon, by indenture of bargain and sale, dated the 29th of *September*, 1734, and by [illegible] levied by Sir *Henry Northcote* and the defendant of the [illegible] estate, both estates were, by the trustees in Mr. *Stafford*'s will, [illegible] Sir *Henry Northcote*, the defendant, conveyed to [illegible], *Francis Kirkham*, and the plaintiff, and [illegible] by the profits or sale of both estates, or any [illegible] sufficient to pay off the incumbrances [illegible] estate, and all other debts and legacies of Mr. [illegible]

[illegible] ce of the trust, with money [illegible] [illegible] and by mortgage of part, and sale of several [illegible] te, and of a small part of the *Stafford* estate, and by [illegible] advanced by Sir *Henry Northcote*, the trustees paid off [illegible] *l.* part of the mortgage of 5300 *l.* and all the other debts and legacies of Mr. *Stafford*, except the 5000 *l.* remainder of the mortgage-money, and except a bond debt of 1050 *l.* to Sir *Henry Northcote*.

And for the better securing the 5000 *l.* residue of the principal and interest on the mortgage, by indenture dated the 10th of *June*, 1735, *William Kirkham*, representative of the surviving trustee of the 500 years term, by the direction of Sir *Henry Northcote*, together with the plaintiff, &c. assigned the trust term to *Thomas Troyte* and others, subject to redemption on payment of the 5000 *l.* and interest, and Sir *Henry Northcote* did thereby extinguish the 5000 *l.* portion; and *Troyte* and the other mortgagees did assign the mortgage term on part of the mortgaged premisses freed from such mortgage, upon trust for Sir *Henry Northcote*, the plaintiff *I*[illegible] and others, and their heirs, upon trust, as by the will of Mr. *Stafford*, and by the same deed, Sir *Henry Northcote*, the plaintiff, &c. did, in lieu thereof, demise the other part to *Troyte* and others the mortgagees for six hundred years, subject to redemption, with the other lands comprised in the 500 years term, so assigned to *Troyte*, &c. on payment of the 5000 *l.* mortgage money, and interest. [432]

Afterwards, by a common recovery, in which Sir *Henry Northcote* and his wife, the defendant, were vouchees, and by indenture of lease and release, dated the 29th and 30th of *April*, 1740, executed by them, and the surviving trustees; such part of the *Stafford* estate as remained unsold was settled as to a rent of 40 *s.* *per ann.* to Sir *Henry Northcote* and his heirs; and as to the rest of the estate of the value of 19,000 *l.* to the use of two trustees for 300 years, in trust for raising 1000 *l.* by mortgage or sale, for reimbursing Sir *Henry Northcote* the money he

he advanced in payment of the debts and legacies of Mr. *Stafford*, and subject to the term to the use of Sir *Henry Northcote* for life, to the defendant for life, remainder to their sons in tail, remainder to their daughters in tail, remainder to the survivor of them in fee.

And such part of the *Kelland* estate as remained unsold, and which was of the value of 12,000 *l.* was, by lease and release, dated the 29th and 30th of *July*, 1740, conveyed subject to a mortgage for securing 1000 *l.* to the use of the same trustees, in trust for Sir *Henry Northcote* and his heirs.

That afterwards, by lease and release, dated the 20th and 21st of *April*, 1743, the estate so in mortgage for 1000 *l.* was, by the mortgagees and Sir *Henry Northcote*, conveyed to the use of *Robert Helyar*, Esq; and his heirs, by mortgage for 2000 *l.* which was borrowed by Sir *Henry Northcote*, in order to discharge the 1000 *l.* then due on the mortgage, and the residue of the 2000 *l.* was to supply some particular occasions of Sir *Henry*, and by him applied accordingly, except only 400 *l.* thereof which remained with Sir *Henry* in his house, or seat at *Pynes*, at the time of his death.

Sir *Henry Northcote* having, by the deed of the 16th of *June*, 1735, extinguished the 5000 *l.* for his lady's portion, and being seised of such part of the *Kelland* estate as remained unsold, for payment of debts of Mr. *Stafford*, and being intitled to 1000 *l.* to be raised by the term of 300 years, out of the *Stafford* estate; and being seised of several manors and lands in *Devonshire*, the inheritance of his ancestors, of the value of 20,000 *l.* did make his will, and a codicil dated the same day, as follows:

"I give all my estate, real and personal, unto *Robert Incledon*, "and others, their heirs, executors, &c. in trust as to so much "of my personal estate as shall be and remain on my seat at "*Pynes* at my death, that they shall suffer my wife to use and "enjoy the same for so many years as she shall live; and as to [433] "my real estate, and also the rest of my personal estate, I devise "it in trust for payment of all my debts, and subject thereunto "for raising five thousand pounds for such child or children of my "body issuing as shall attain twenty-one, to be paid to such "child or children, if but one, but if more than one, equally to "be divided between them; then, as to my real estate, the "same shall remain to the use of the first and every other son "and sons of my body, and the heirs of the body of such son "and sons, and in default of such issue, then to the use of the "the daughter and daughters; and in default of such issue, then "to the use of my wife for her life, and appointed *Incledon* and "others executors."

A codicil to be annexed to my will.

"*Item*, My will is, that the trustees within named do sell "the *Kelland* estate, and apply the money arising from such sale "to the discharge of the mortgage due thereon to *Robert Helyar*, "and after that is satisfied, to apply such other money arising

INCLEDON v. NORTHCOTE.

"from it, to the discharge of the mortgage, to Sir *Thomas* "*Acland*'s trustees on the *Stafford* estate, to the intent that "the *Stafford* estate may be free and clear to my dear wife, "and after the two mortgages are fully paid, my wife shall be "intitled to receive the rents of the overplus of the *Killand* "estate during her life, and after her death, to go in strict set- "tlement in the manner I have settled my lands in the body of "my will."

Sir *Henry Northcote*, at his death, had issue living *Stafford*, now Sir *Stafford Northcote*, his eldest son, *an infant*, and the plaintiffs *Bridget*, *Maria Northcote*, *Henry*, *Hugh* and *Charles Northcote*, and was at his death possessed of a considerable personal estate, consisting, among the rest, of chattel, corn, houshold goods and plate, at his seat called *Pynes* (which was part of the *Stafford* estate), of the value of about twelve hundred pounds, over and above the dressing plate and jewels used by Lady *Northcote* in his life time, and also over and above four hundred pounds in cash remaining at *Pynes*.

The defendant Lady *Northcote* insists, that (by virtue of the clause in the will of Sir *Henry Northcote*, whereby the trustees are to permit her to use and enjoy, for her life, so much of his personal estate as should remain at *Pynes* at his death) she is intitled to the use not only of the goods and plate then in Sir *Henry Northcote*'s dwelling house at *Pynes*, but also to the use of the four hundred pounds remaining in the house, and of all the cattle, sheep, horses, corn, grain, and live and dead stock, upon the farm of *Pynes*.

[*434] And that she is intitled, to her own use, absolutely, to many pieces of plate, rings, diamonds, &c. as her *paraphernalia*.

And also insists, she is intitled to her dower of the *Northcote* estate.

It was insisted on behalf of Sir *Stafford Northcote*, the son of the testator Sir *Henry*, that the defendant, Lady *Northcote*, is not intitled to the use of the four hundred pounds, or any of the dead or live stock on the farm at *Pynes*, nor of any goods plate or personal estate at *Pynes*, other than what was in the dwelling-house, or seat there.

And that the plate and jewels, claimed as *paraphernalia* ought to be applied for the payment of the debts of Sir *Henry Northcote*, in case of a deficient estate.

And insisted likewise, that Lady *Northcote* having, since the death of Sir *Henry Northcote*, entered upon the *Stafford* and *Killand* estates, and become seised thereof for life, by virtue of the several conveyances, will and codicil, is thereby debarred from all right of dower of the *Northcote* estate.

And also insists that one fifth part of the five thousand pounds, directed by the will of Sir *Henry Northcote*, to be raised for such child or children of his body as should attain the age of twenty-one, doth belong to him in case he attains twenty-one, and that, in the mean time his brothers and sister are not intitled to any interest for the five thousand pounds, or any allowance out of the profits

profits of the estate charged therewith, for maintenance and education.

That in regard of these differences and doubts, the trustees in Sir *Henry Northcote's* will, cannot safely execute the trusts without the direction of the court, and therefore, that an account may be taken of the personal estate devised to the trustees, and applied towards the debts of Sir *Henry Northcote*; and that the claim of dower by Lady *Northcote* out of the *Northcote* estate, and the other disputes may be determined by the court, and that the plaintiffs, the younger children of Sir *Henry Northcote*, may have a reasonable allowance for their maintenance and education, till their portions shall become payable, was the end of the bill.

Lady *Northcote*, by her answer, makes another point, that as she has survived Sir *Henry Northcote*, the residue of the term of five hundred years, for raising the defendant's portion, shall be deemed to be a security for one fourth part only of the mortgage money, and to sink no more than one fourth part of the defendant's portion of five thousand pounds, but that upon payment of the five thousand pounds to *Twyte* and others, by sale of part of the *Kelland* estate, or part of the *Stafford* estate, the residue of the term of five hundred years shall be a security for raising the remaining three parts of the defendant's portion; and the rather, for that Sir *Henry Northcote*, by his will and codicil, hath directed the mortgage of five thousand pounds on the *Stafford* estate, to be discharged by sale of part of the *Kelland* estate, to the intent that the *Stafford* estate might be free and clear to the defendant. [435]

Lord Chancellor took a week's time to consider of the case, and this day gave judgment.

One question is, as Lady *Northcote* has survived Sir *Henry Northcote*, whether the five thousand pounds has survived to her as a *chose in action*, or whether it shall be considered as part of her husband's personal estate.

And, I am of opinion, it ought to be taken to be part of his personal estate.

The great objection is this, that no settlement was made upon her, either on the marriage, or since, and she has gained nothing out of Sir *Henry Northcote's* family, and therefore it is hard this should be taken from her.

To be sure, it is a matter of hardship, but if her father married her without requiring a settlement, the court can give no relief, and she might marry too in expectation of dower.

But I rely upon the acts which have been done by Sir *Henry Northcote* and his Lady, and whether there has been a sufficient disposition of the five hundred years term by Sir *Henry Northcote*.

Nothing is clearer, since Sir *Edward Turner's* case, 1 *Vern.* 7, and *Pitt* versus *Hunt*, 1 *Vern.* 18. that a husband may dispose

2 of

Incledon v. Northcote.

of the wife's term, or the trust of her term, and prevent any thing surviving to the wife (1).

The *Stafford* estate coming to Sir *Henry Northcote* in the life-time of Lady *Northcote*, subject to the mortgage made by Mr. *Stafford* for five thousand pounds, he had a right, in any shape, to make it his own, and has assigned over this five hundred years term, and so have the trustees, by his direction, as a further security for the very sum.

It has been objected, that if a husband raises money on the wife's freehold, and covenants to pay it, that his assets must be liable to exonerate the wife's estate.

[436]

Where a husband is but tenant by the curtesy, and has only an interest for life in the wife's estate, he cannot affect that estate without her joining.

That is the rule, but in what case? Why where he cannot affect the wife's estate without her joining (2), as where he is but tenant by the curtesy, or has only an interest in it for her life; but here it was his own, and he could at any time, during his life, assign the term.

A wife having the trust of a term in her, joining with her husband in a common recovery, she comes in by voucher in privity of all her estate legal and equitable, and is therefore barred of any claim to it afterwards.

But it does not rest here; for the deed in which Sir *Henry Northcote* and Lady *Northcote* have joined, has put this question quite out of all doubt, for they have suffered a common recovery, and declared the uses of it, and that they intended to make a new settlement of this *Stafford* estate; and Lady *Northcote* having the trust of the term in her, and coming in by voucher she comes in in privity of all her interests both legal and equitable, and therefore has barred herself of any sort of claim whatsoever, and consequently has no right to the five thousand pounds.

The next question is, as to the defendant's claim of dower out of the real estate of Sir *Henry Northcote*? She insists she has done nothing to bar her of her dower in the estate Sir *Henry Northcote* left at the time of his death.

Though the husband by his will gives the wife the very estate in remainder from which she demands her dower, yet on all the circumstances of her case, she is intitled to her dower out of it notwithstanding.

I am of opinion, she is intitled to dower (3); for it would be very hard if no settlement was made on her marriage, and she is barred too of her five thousand pounds, that she should also lose her dower: All he has given by his will to the defendant, Lady *Northcote*, is a specific legacy of personal estate at his seat at *Pyns*, and a remainder to her for life in his real estate, in default of issue male, and female, by himself.

Lady *Northcote* insists, not only on her dower, but on the benefit of such legacies likewise as are devised to her by the will.

It has been objected, by the counsel for Sir *Stafford Northcote* that the devises by the will do, in some measure, clash with her claim of dower, and are intirely inconsistent with it, because the

(1) [illegible] *Bates* v. *Dandy*, ante 2 vol. 208. [illegible] *Pawlett* v. *Pawlett*, ante 2 vol. 384 and cases there.

(3) See the cases cited in the note to *Gulton* v. *Hancock*, ante 2 vol. 427.

testator

testator gives her the very estate in remainder, out of which she demands her dower, and therefore she must either take totally under the will, or totally reject it (1).

I do agree, this has been the general rule ever since the case of *Noys* versus *Mordaunt*, 2 *Vern*. 581. which was decreed in *Hilary* term, 1706, but the question is, whether Lady *Northcote*, upon the circumstance of the case, is to be excluded; and I am of opinion, upon the authority of *Lawrence* versus *Lawrence*, 2 *Vern*. 365. she is not, which was finally determined ten years after *Noys* versus *Mordaunt*, and seems to me to be a case in point; the decree was first made by Lord *Somers* against the wife, [437] reversed by Lord Keeper *Wright*, and the decree of reversal affirmed in the House of Lords, and determined too by them upon the merits of the case in *May* 1716; for though Lord *Cowper* said, he would only enter upon the point relating to the account, yet he certainly was not precluded from examining into the claim of dower likewise; but it appears by a note that I have of this case, that the House of Lords did not think themselves confined to any particular part, but decreed upon the whole case.

This present case stands distinguished from *Noys* versus *Mordaunt*, upon the reason of the thing likewise, for the claim there would have overturned the will *in toto*.

But Lady *Northcote* does not claim to overturn the will *in toto*, but merely a temporary interest, and is only taking out that *excrescent* interest for a time, and afterwards it will go on as the testator intended it.

The wife taking out of the estate only an excrescent interest for a time, does not overturn the will.

The third question is, what passed to Lady *Northcote* by the words personal estate on my seat at *Pynes* for her life.

It was insisted, by her counsel, that she is intitled to all the houshold goods and furniture, stock upon the ground, and the four hundred pounds in money in the house at Sir *Henry Northcote*'s death.

But the counsel on the other side have said, it is to be taken more strictly, and that it ought to be confined to the goods in the house and gardens at *Pynes only*.

But this is too streight a construction.

As to the four hundred pounds, I am of opinion it did not pass by this devise (2), nor is within the meaning of the words; it might as well have passed *choses in action* (3); but I think that all the stock on the farm *live* and *dead*, and *all stores* on the lands held in hand, which were enjoyed at *Pynes*, for the use and accommodation of the house and seat, will pass to the wife, for she was to reside there with her children, and were plainly intended for her use in carrying on the farm.

Indeed it is said for her life, and therefore it was objected she ought only to have the usufructuary interest.

(1) *Vide Morris* v. *Burrows*, *ante* 2 vol. 629.

(2) *Woolcomb* v. *Woolcomb*, 3 P. W. 112. But see countess of *Aylesbury*'s case cited, 1 *Ves.* 273. *Popham* v. *Lady Aylesbury*, *Amb.* 68 S. C.

(3) *Vide Chapman* v. *Hart*, 1 *Ves.* 273. *Moore* v. *Moore*, 1 *Bro. Cha. Rep.* 127.

But

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But then all bequests of goods for life are subject to contingencies, reasonable wear and consumption and an inventory must be made of them.

Where personal estate has been exhausted by a husband's creditors, and there is a trust estate charged with payment of debts, the wife intitled to come upon that estate to be reimbursed the value of her *paraphernalia* (1).

A fourth question is, as to Lady *Northcote's paraphernalia*, and she must have them in some shape or other, but, to be sure, not to the prejudice of creditors, yet, as here is a trust estate, charged with payment of debts, which is sufficient for that purpose, she may come round upon the trust estate to be reimbursed to the value of her *paraphernalia*, if the personal has been exhausted by her husband's creditors; and determined so in several cases.

A devise of 5000*l* out of an estate equally, to testator's children, with remainder in the same estate to his first and other sons, *the eldest son shall have a share.*

The last question is, Whether by the devise of five thousand pounds out of his estate, equally to be divided between his children, with remainder in the same estate to his first and other sons, Sir *Stafford Northcote* the eldest son shall have a share.

It has been objected, that though there is the general word children in the will, yet it cannot be conceived, that he intended his eldest son by it, for he is to take the estate itself, and it would be absurd that he should provide for him out of the estate, and yet give him the estate.

But I am of opinion, that the words are too strong to say, that Sir *Stafford Northcote* is not a child, and though the estate is given to him as the first son, yet it is given likewise to every other son, and therefore it might as well be said to take away the share of a second son.

The children have insisted upon interest on their shares for their maintenance, though the five thousand pounds is given to such children of his body as should attain the age of twenty-one, and consequently is not vested.

Where legacies are given to a stranger, either payable at twenty-one, or not till twenty-one, they can have no interest in the mean time, but where given to children, in either of these cases, they shall have interest immediately (2).

In the case of strangers, whether the legacy be given absolutely, and payable at twenty-one, or not given until twenty-one, they can have no interest in the mean time; but in either of these devises, where they are given to children, the court will direct interest for their portions immediately; and it has been so done frequently.

Though no more had been allowed for many years than four *per cent.* for maintenance, yet in consideration of mortgages being then at four and a half, and several at five *per cent.* the court ordered the children should have four and a half *per cent.* interest on their shares of the 5000 *l.*

It being insisted, that the younger children, in regard that the eldest son is intitled to one share of the five thousand pounds, ought to be allowed interest at five *per cent.* for their maintenance, their provision being so scanty; *Lord Hardwicke* said, at first,

(1) So *Ridout* v. *Plymouth*, ante 2 vol. 104. *Boynton* v. *Parkhurst*, 1 *Bro. Cha. R.* p. 576. Sed vide *Probert* v. *Clifford*, *Amb.* 6. ante 1 vol. 410. S. C. 2 *Cox's* P. W. 544. S. C. *Vide ante* 369.

(2) See *Heath* v. *Perry*, ante 102. notes 1 and 2.

as no more had been allowed for many years than four *per cent.* for maintenance, he did not care to break through the rule; but afterwards, in consideration of the interest of money being altered within these two years, mortgages being then at four and a half, and several at five *per cent.* his Lordship ordered the children should have four and a half *per cent.* interest upon their shares of the five thousand pounds. INCLEDON v. NORTHCOTE.

Rose versus *Gannel*, *March* 3, 1746. *Second Seal after Hilary Term.* Case 152.

A Bill was brought for discovery and perpetuating the testimony of witnesses; the plaintiff struck out the discovery (1), and all the relief; but, in praying of process, prays that the defendant may abide such order and decree as the court shall think proper to make.

In praying of process upon a bill brought for a discovery, and for perpetuating the testimony of witnesses, the plaintiff prayed the defendant might abide such order and decree as the court thought proper to make, a demurrer on such a bill allowed, for it is praying relief as well as a discovery.

The defendant moved that he might be paid the costs of the suit, and that it might be referred to a Master for that purpose.

LORD CHANCELLOR,

The words *order* and *decree*, in the prayer of the process, make it a bill for relief, and regularly ought to be dismissed: but I will not direct the costs of suit to the defendant, till the precedents are searched of bills for perpetuating the testimony of witnesses, to see whether it is usual, in praying the process of the court, to insert the words, that the defendant may abide such order and decree as the court shall think proper to make (2).

N. B. Some considerable practisers at the bar said, that there was a case before Lord *Talbot* of a bill for discovery, with these words, *in the prayer of the process*; and upon the defendant's *demurring*, his Lordship said, it was praying relief, as well as a discovery; and allowed the demurrer.

(1) It appears from the Register's book, that the plaintiff only struck out the *relief*, and not the discovery.

(2) Ordered, that the defendant should be paid his costs, except those of examining his witnesses. *Reg. Lib. B.* 1746. fol. 180.

Barley versus *Pearson*, *March* 3, 1746. *Second Seal after Hilary Term.* Case 153.

MR. *Ord* moved at a former seal, to suppress an answer returned upon a commission out of the country, for want of being signed by the party; it stood over till to day, to

The register certifying that there are precedents of answers returned upon a commission out of the country, which have not been signed by the party; Lord *Hardwicke* would not suppress the answer for want of it, but said, he would consider of a rule to make the proceedings in this matter uniform for the future.

give

Barley v. Pearson.

give the register an opportunity of searching precedents, who certified, that they are both ways, some signed, and some not signed by the party.

[440]

The counsel for the motion said, there was one great inconvenience in the parties not signing them; that if he should be guilty of perjury, it would be a difficult matter to convict him, because they must prove the identity of the person who swore the answer; and there was a case before Lord Chief Justice *Lee*, where the defendant was acquitted, because the Master, before whom the answer was sworn, would not venture to swear it was the same person.

Lord Chancellor,

The old rule of the court, before the statute for amendment of the law, was to send the tenor of the bill to the commissioners, but this was done so loosely in the office, that it did not answer the end of assisting them in framing the answer, and therefore the act took away the practice of sending with the commission *tenorem billae*.

The old rule of the court before the statute of 4 & 5 *Ann. ch.* 16. for amendment of the law, was, to send to the commissioners the tenor of the bill, and they examined the defendant, in taking his answer by this tenor, in the same manner as if they had been examining him upon interrogatories, and in the return of the commission, certified the method in which they took his answer; so that there was no occasion either for the counsel or the party to sign the answer; but, by degrees, the inserting the tenor of the bill in the commission, was done in so loose a manner, in the office, that it became a mere ballad, and was no real use to the parties, and did not at all answer the end of assisting the commissioners, in framing the answer, but was a fruitless and unnecessary expence; so that the act of parliament for amending of the law, very judiciously took away the practice of sending with the commission *tenorem billae*.

And therefore, as this is now omitted, it is necessary the party, as well as the commissioners, should sign an answer taken in the country, but not material it should be signed by a counsel.

But as, at present, the precedents are both ways in the office, and in some counties in *England*, they follow the old practice still, in omitting to make the party sign the answer, it would be too hard in one particular case, to suppress the answer, but his Lordship said, that he would consider of some rule to make the proceedings in this matter uniform, for the future, throughout the kingdom.

Case 154. *March* 7, 1746, *this Day the Cause of Trafford versus Boehm stood for Judgment, Lord Hardwicke having taken a few Days to consider of it.*

BY indenture of the 30th of *November* 1692, between *Clement Boehm* of the first part, *Ann Dilke* of the second, and two trustees of the third, reciting a marriage, intended between *Clement* and *Ann*, and that she was seised of lands in *Hackney*, she, with the privity of *Clement*, for the better provision for her, and her issue by *Clement*, granted and released the lands to the trustees and their heirs.

To

To the use of *Clement* and *Ann* during their lives, and the life of the survivor.

Remainder to the trustees, to preserve contingent remainders: Remainder to the first son of *Clement* by *Ann* in tail male: Remainder to the second and every other son in tail male; remainder to the daughters in tail general: Remainder to the survivor of *Clement* and *Ann* in fee.

And by the same deed *Ann* assigned 1200 *l.* in money to the trustees, to be laid out in purchasing lands in fee-simple, with the consent of *Clement* and *Ann*, and the survivor, to the same uses as were limited of the lands released by this deed, and a proviso that the trustees, if required, should lay out 600 *l.* part of the 1200 *l.* in the purchase of a house, to remain to *Clement* and *Ann*, or the survivor.

And by the same deed *Ann* assigned to the trustees 2000 *l.* due to her from the chamber of *London*, to be laid out in lands to the same uses.

Clement covenanted to leave *Ann* such part of the personal estates as she should be intitled to by the custom of *London*, in case he was a freeman at his death.

There was issue of the marriage *Sigismund Boehm* (afterwards called *Trafford*) the eldest son, and the plaintiff's late husband, and several other children.

Upon the marriage of the plaintiff with *Sigismund Trafford*, her fortune was to be laid out by *Henry Heathcote* and *Charles Boehm*, the trustees under the settlement before marriage, in the purchase of lands to be settled to several uses, with an express proviso that *Heathcote* and *Boehm*, till a proper purchase of lands could be found, should by *Sigismund's* direction or consent invest the trust money *in government funds or other good securities*.

And there was a recital in this settlement, that *Sigismund*, by virtue of his father's marriage settlement, was seised in remainder of the land in *Hackney*, to him and the heirs male of his body, and to the reversionary interest in the 600 *l.* part of the 1200 *l.* and in 1855 *l.* 15 *s.* 9 *d.* produced from the 2000 *l.* orphan stock, and that he covenanted to convey (if he survived his father) the land in *Hackney*, the 600 *l.* and 1855 *l.* 15 *s.* 9 *d.* to the trustees, for the more effectual raising so much, as with the plaintiff's fortune would purchase lands of 400 *l.* a year, for particular purposes. [442]

Henry Heathcote died, and all the trust money remained in the hands of *Charles Boehm*.

The plaintiff's fortune lying dead, and no proper purch then offering, 8585 *l.* thereof was, by the direction of her father and her husband, invested in the purchase of 7000 *l.* *South-sea* stock.

Three years afterwards, *South-sea* stock being greatly fallen, and the plaintiff's father and husband apprehending a further fall, it was sold by *Charles Boehm*, and the sum of 1369 *l.* 5 *s.* *was lost by the difference of price in buying and selling the* South-sea *stock*.

Clement

TRAFFORD v. BOEHM.

Clement Boehm, the father of *Sigismund*, by his will dated the 8th of *July* 1725, devised to *Sigismund* the land in *Hackney*, *and the two thousand four hundred fifty-five pounds fifteen shillings and nine-pence*, viz. *the one thousand eight hundred fifty-five pounds fifteen shillings and nine-pence, and the six hundred pounds above mentioned*, and gave to his son *Clement Boehm* 2000 *l.* and to his other children divers legacies, and the residue of his estate to his sons *Charles* and *Edmund*, whom he appointed executors, and declared he had given all his children more than was coming to them by the custom of *London*, and therefore willed, that, upon payment of every legacy, a full discharge should be given to his executors, and in case of refusal of such discharge, he or she refusing should have no more of his estate than was due by the custom.

The testator died in *June* 1734, and the two following receipts were given by *Sigismund* and *Clement*.

Received *May* the 19th 1735, of my brothers *Charles Boehm* and *Edmund Boehm*, executors to my father deceased, the 2455 *l.* 15 *s.* 9 *d.* pursuant to my father's last will, and in full of all claims and demands whatsoever upon my father's estate by virtue of his marriage contract, or otherwise, acknowledging this receipt to be a full release and discharge to his executors.

Sigismund Trafford.

Received the 2d of *November* 1734, of my brothers *Charles* and *Edmund Boehm*, executors to my father deceased, the full sum of 2000 *l.* pursuant to my father's last will, and accordingly [443] I quit claim for ever to any and all demands whatsoever upon the estate of my father, acknowledging and declaring this to be a full discharge to his executors.

Clement Boehm.

The plaintiff's husband died the 1st of *February* 1740, without issue, leaving his brother *Clement Boehm* his heir at law.

By his will, dated the 4th of *March* 1739 *Sigismund* gave all his real estate to the plaintiff for life, without impeachment of waste, and after her death and failure of issue by him, and payment of debts, to his sister *Theodosia Hepser* for life, with remainder to several other persons for life, remainder to his own right heirs; and taking notice of the settlement made on his marriage and that the trustees were to lay out the plaintiff's portion in lands, and that he had no issue, he charges the reversion in fee of the lands purchased, or to be purchased with her portion (expectant on the deceases of the testator and the plaintiff, and failure of their issue), with his debts, and after payment thereof, devises the same to his brothers and sisters, in such manner and for such estates as he had before devised his real estate, with remainder to his own right heirs.

Clement Boehm, the brother of *Sigismund*, died the 30th of *September* 1741, leaving the defendant *Clement Trafford* an infant, his only child, and heir at law.

LORD CHANCELLOR,

I am extremely well satisfied with the opinion I am going to give, and therefore did not think I ought to delay the parties by putting it off to a further time.

The

The end of Mrs. *Trafford*'s original bill is to have the benefit intended for her from her portion, and her husband's covenants in the settlements previous to her marriage. TRAFFORD v. BOEHM.

The end of *Charles Boehm*'s cross bill (third son of old *Clement Boehm*, and surviving trustee under his brother's marriage settlement) is to have the trusts of that settlement performed, and to have all just allowances, and in particular to be discharged of the 1369*l.* 5*s.* part of the trust money lost by the fall of the *South-sea* stock, and that the 600*l.* and 155*l.* 15*s.* 9*d.* making together 2455*l.* 15*s.* 9*d.* may either be applied to make good the trusts of the settlement of the 30th of *November* 1692, made on the marriage of old *Clement Boehm*, or to make good the trusts of his brother *Sigismund*'s settlement, as the court shall direct.

Under these covenants, and these trusts, several of the questions arise.

One question is, upon whom the loss of the 1369*l.* 5*s.* shall fall, and whether that loss has arisen from a disposition of the trust money according to the terms of the trust? [444]

I am of opinion the loss has not happened from a disposition of the trust money according to the terms of the trust, but that it has been laid out in a different manner from what was intended by the trust.

To be invested, till a purchase of lands could be found, in government funds, or other good securities.

Neither *South-sea* stock nor Bank stock are considered as a good security, because it depends upon the management of the governors and directors, and are subject to losses; for instance, it is in the power of the *South-sea* company to trade away their whole stock while they keep within the terms of their charter (1).

Laying out the money in *South-sea* stock, *not a good security* according to the terms of the trust, as it is subject to losses; for the directors may trade away their whole stock whilst they keep within the terms of the charter.

But *South-sea* annuities and Bank annuities are of a different consideration; the directors have nothing to do with the principal, and are only to pay the dividends and interest till such time as the government pay off the capital, and it is not in their power to bring any loss upon them, and therefore are only and properly good securities.

South-sea annuities and Bank annuities are only and properly *good securities*, for it is not in the power of the directors to bring any loss upon them.

The word *funds* does not alter it, because it must relate to such funds as are a good and undoubted security.

There is no doubt but this court will endeavour to deliver a *trustee* from any mischief that may happen from a misapplication of trust money, which brings it to the consideration how this loss is to be made good to the trust estate.

This court will endeavour to deliver a *trustee* from a misapplication of trust money.

Now, as to the manner of making it good to the trust estate, it must first come out of the estate of *Sigismund Trafford*, because done neither with his concurrence, or subsequent assent; for he has passed the account with his brother *Charles*, and constantly received the dividends of the *South-sea* stock.

(1) *Vide Jackson* v. *Jackson*, *ante* 1 vol. 513.

*TRAFFORD v. BOEHM.

Where a trustee errs in the management of the trust, yet if he goes out of it with the approbation of the *cestue que trust*, it must be first made good out of the person's estate who consented.

The rule of the court in all cases is, that if a trustee errs in the management of the trust, and is guilty of a breach, yet if he goes out of the trust with the approbation of the *cestui que trust*, it must be made good first out of the estate of the person who consented to it.

[445] Therefore *Sigismund*'s estate must be applied in the first place.

The next question is, and the principal one in the cause, as to the sum of 2455 *l.* 15 *s.* 9 *d.* arising out of the funds which were part of the portion of old Mr. *Clement Boehm*'s wife, whether it shall be considered as real or personal estate upon the circumstances of the case.

It must be admitted that it was to be laid out in land, and consequently, on the foot of the settlement in 1692, must be taken *primâ facie* as land, and go as real estate would have done.

The question will be then, Whether the acts since done are sufficient to bar the entail as it is called, or to discharge the *transubstantiated* real quality given it in the consideration of this court.

It is a transaction of fifty years standing; and it appears too that the money; though vested in trustees, was in the hands of old Mr. *Clement Boehm*; *Sigismund* had an expectation of this money coming to himself, and by his settlement covenants that (in case he survives his father) he will assure and make over the 2455 *l.* 15 *s.* 9 *d.* to the trustees, for the more effectual raising so much as with the plaintiff's fortune would purchase lands of 400 *l.* *per ann.* this is not made a part of the fund to be laid out, but a further sum for the purchase of lands for the plaintiff's benefit.

Old Mr. *Clement Boehm* on the 8th of *July*, 1725, executes a will, and takes upon him to make a disposition of his estate among his children, and gives the 2455 *l.* 15 *s.* 9 *d.* to *Sigismund Trafford*.

After his death the children accept their legacies, and *Sigismund* and *Clement* sign receipts and discharges to the executors of old Mr. *Clement Boehm*, and the other sons give discharges for their legacies likewise.

Upon this it has been insisted on the part of the plaintiff Mrs. *Trafford*, that it is not now to be considered as a debt, and subject to be laid out for the benefit of the remainder-men in tail, under the dead of 1692, because *Sigismund Trafford*, the first tenant in tail, took the money with the consent of his other brothers, and therefore is discharged from the entail.

Two objections have been made on the part of the defendant *Clement Trafford*, the son and only child of *Clement Boehm* the younger, and consequently, if a remainder exists in this money, he is intitled to it.

The

The first objection was, that these acts were done by the parties subsequent to the settlement in 1692, and are not sufficient to shew the intention of the parties that the entail of this money should be barred.

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The second objection, if sufficient to shew the intention, yet cannot be a bar without a decree of this court.

I am of opinion the acts done by the parties are sufficient to shew it was their intention, particularly of *Clement* the father, to bar that analogy to the real, or that entailed quality in the money.

Old *Clement* gives this very sum to *Sigismund*, and apprehended that he was disposing of his own estate, and unless he has given him this, he has given nothing to *Sigismund*; then follows the clause in the will, relating to the releases.

It has been objected that this is to be confined to the disposition of his personal estate according to the custom of *London*.

But it ought not to be narrowed in this manner, for he intended clearly to bar his children of all the claims to every part of his estate by the legacies given to them.

What is done subsequent?

A payment is made by the executors to Mr. *Sigismund Trafford*, of the 2455 *l.* 15 *s.* 9 *d.* in satisfaction of all his claims he might have under the marriage-settlement, and he has given a receipt in full of all claims, and all the children with notice of their father's will do the same.

Therefore I am of opinion it was the intention of the parties that *Sigismund Trafford* should have this money as his absolute property, taking in the circumstances arising from the consent of the remainder-man.

The next question is, Whether the acts done have discharged this money from *the transubstantiated real quality*, which the high power of this court gives to money.

This court considers things contracted to be done, as actually done, and let them have all the consequences as if formally executed.

What governs the court in this respect is, that they consider things contracted to be done, as *actually done*, and let them have all the consequences, as if formally executed, therefore if there be an agreement to purchase land, the court looks on it *as done* (1).

But if the parties interested have agreed that the money shall not have this quality, that is *to be entailed*, it discharges it of *the entail* (2).

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Money to be laid out in land to the use of *A.* and his heirs, will intitle *A.* to the money in this court.

*If a man is intitled to have money to be laid out in land to be settled to the use of him and his heirs, there he shall be intitled to the money in this court, and if the party in his life-time shews any intent to have it in money and dies, then the court will give it to his executor, and not to the heir (3).

(1) *Guidot* v. *Guidot*, *ante* 254.

(2) *Crabtree* v. *Bramble*, post. 680 note 1.

(3) See *Seeley* v. *Jago*, 1 P. W. 389. *Cunningham* v. *Moody* 1 *Vés.* 176.

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Money directed to be laid out in land and limited to *A.* in tail, with several remainders in tail, the court will order it to be laid out, if nothing has been done to bar the remainders.

If money is directed to be laid out in land, and limited to *A.* in tail, remainder to *B.* in tail, remainder to *C.* in tail, the court will direct it to be laid out in land, if nothing has been done to bar the remainder (1).

Where a person is tenant in tail, reversion in fee to himself, the court will give him the money, because by a common conveyance he may bar the entail and reversion.

But if a person is tenant in tail, reversion in fee to himself, the court will give him the money, because by a common conveyance he may bar the entail and reversion; and therefore the court will not put him to the circuity of having recourse to a legal bar *. (2).

In *Edwards* versus *The Countess of Warwick*, 2 *P. Wms.* 171. Lord *Macclesfield* has laid down the rule of the court in these cases.

The limitations here were to *Sigismund Trafford Boehm* in tail, remainder to his brothers in tail, remainder in fee to himself: this money has been paid to him with the consent of his brothers.

Was there then any entailable quality remaining in this money?

If a bill had been brought by *S.* to have the money paid to him, and the brothers by their answers had submitted to it, their issue would have been equally barred as if the brothers had received a part of the money themselves.

Suppose a bill had been brought by *Sigismund Trafford Boehm* to have the money paid to him, instead of being laid out in land, and his brothers had, by their answers, submitted this money should be paid to *Sigismund*, could the issue of the brothers have insisted it should be laid out in land? Most clearly not, for their issue are equally barred, as if the brothers had received a part of the money themselves.

But it was objected there is no instance of this being done without a decree of the court for that purpose.

Where the tenant in tail, &c. is a feme covert, she must come into this court, that they may ask her whether it is with her consent that the money is to be paid, instead of being laid out in land.

* It is the first time I have heard it laid down that the decree of this court is necessary, and that the parties must come here to have the sanction of the court; indeed if the tenant in tail, or remainder in tail, had been a *feme covert*, she must have come here, that the court might have asked her the question, whether it is with her consent, that the money is to be paid instead of being laid out in land, as in the case of a fine (3).

It was said there is no precedent, and indeed I cannot say that I have known this court decree acts of this kind to be good, but I will make a precedent.

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(1) See *Collet* v. *Collett*, *ante* 1 vol. 11.

(2) Se note to *Collet* v. *Collet*, *ante* 1 vol. 11.

(3) *Oldham* v. *Hughes*, *ante* 2 vol. 453, 454. *post.* 449.

* Money covenanted to be laid out in land shall descend as land, but he that is intitled to the fee of the land, when purchased, may dispose of it by a will, though not attested by three witnesses: also a parol direction for the payment of it seems to be good. So if the money is ordered or devised to be laid out in lands, and settled to the use of *A.* in tail, remainder to himself in fee, equity will order the money to *A.* otherwise if the remainder thereof be limited to a third person. Also though by a voluntary contract money is agreed to be laid out in lands, the court will execute such agreement in favour of the heir. *Edwards (and Lady Elizabeth his wife)* versus *Countess Dowager of Warwick*, 2 *P. Wms.* 171.

Vide

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Vide Chaplin versus *Horner*, 1 *P. Wms.* 483.*

Bills are generally brought in cases of this nature for the satisfaction and security of trustees.

The court pursues the rights of parties, and whatever a court of common law does by a judgment or this court by a decree, is in affirmance of the rights of parties, and does not give them a right which they had not before.

A judgment at law, or a decree of this court, is in affirmance of the rights of parties, but does not give them a right that they had not before; and it is on this ground they decree the money to the parties.

Why do the court decree the money? Because the person was intitled to it; and the court being of opinion the parties have the right, is the ground on which the decree is made.

But where the money is in the hands of tenant in tail, with remainder in fee in himself, if he was to bring a bill to have a declaration of the rights of the parties, it would be dismissed, for this court does not make a declaration of the rights of parties, but decrees upon the rights of the parties as they appear in themselves.

I mention this to shew, that all the court does is in consequence of an antecedent right of the parties, and there is no occasion for a decree in this court, unless there is an incapacity of the person, as I said before in the case of a feme covert.

All the court does is in consequence of an antecedent right, and there is no occasion for a decree, except there is an incapacity of the person, as in the case of a feme covert.

It has been said that the money still retains the real quality, and therefore must be laid out in land.

Sigismund Trafford Boehm shewing his election to have it in money, destroys that *transubstantiated real quality*, for he has accepted it as money under the will, and given a discharge for it to the executors, and by a subsequent settlement in 1725, has taken upon him to make a security of it as money. [449]

I am of opinion therefore this sum is not liable to any entail, nor to be laid out in land, or considered as a debt upon the estate of *Sigismund Trafford Boehm*.

The next question is as to the limitation of *Sigismund Trafford*'s estate under his will, whether the limitation to his sister, in failure of issue by him, be a good limitation.

The limitation under the will of *S.* in failure of issue by him, to his sister for life, is good in point of law.

I had a good deal of doubt with myself in this point; but there is a plain reference to the deed of settlement executed before, and shews he intended to give this as a reversion, after the limitation of his settlement were determined.

But suppose there had been no reference, if a man limits ten thousand pounds, in failure of issue of the body of husband and

A. limits 10,000*l.* in failure of issue of the body of a husband and wife to *B. in tail*, the remainder is void as an executory devise, being too remote, otherwise where the limitations are for life, for that confines it to a failure of issue during the lives in being; and in the case of executory devises it has been held to be a reasonable construction, if it falls within the compass of ever so many lives in being at the same time (1).

(1) See *Hodgeson* v *Bussy*, *ante* 2 vol. 89. *Beauclerk* v. *Dormer*, *ante* 2 vol. 309.

* Where money is covenanted to be laid out in a purchase of land, and to be settled on *A.* in fee, the heir and not the executor of *A.* shall have it. But if *A.* himself has received any of this money, this is a good payment, and shall not be repaid by *A*'s executor to his heir. Also if *A.* in this case dies, *A*'s heir shall recover the remainder of the money not received by *A.* So if *A.*'s heir is an infant, and the remainder of the money is decreed to be brought into court, it shall be looked on as land. *Chaplin* versus *Horner* & ux', 1 *P. Wms.* 483.

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wife to any other person in tail, the remainder would have been void as an executory devise, being too remote, as it is upon a dying without issue generally of the husband and wife; but here, as was justly observed in the cause, all the limitations by *Sigismund* are for life, therefore it is a reasonable construction to confine it to a failure of issue during the lives in being, which has been held in the case of executory devises to be a reasonable construction if it falls within the compass of ever so many lives in being at the same time.

His Lordship decreed therefore the limitation under the will of *Sigismund* to his sister *Theodosia Hopser*, one of the defendants in the cause, to be a good limitation.

Where a feme covert has an interest in real estate, no consent of a remainder man can bar the entail, unless there had been a fine; nor can this court carry such agreement into execution as to a legal estate.

As to the seven acres of land in *Hackney*, the estate of old Mr. *Clement Boehm*'s wife before her marriage, and limited to several persons under the deed of 1692, his Lordship was of opinion that no consent or agreement of the remainder-men, where there is a feme covert, unless there had been a fine, can bar the entail, nor is it in the power of a court of equity to carry such agreement into execution, as to a legal estate; and therefore must take its course according to the legal intent, and go to the person who is intitled at law (1).

(1) *Reg. Lib.* B. 1746. fol. 533. *Vide ante* 448.

Case 155. *Heard before the Master of the Rolls, sitting for Lord Chancellor, March 5, 1746.*

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Hume and Elizabeth his Wife, younger Daughter of Nathaniel Rokeby, — Plaintiffs.

Edwards, Executor of Rokeby and Mary his Wife, eldest Daughter of Rokeby, and others. Defendants.

Sums of money given to the daughter of a freeman of *London* after her marriage, by the father, where they do not appear to be on account of the marriage and as an advancement, will not bar her of a share in the orphanage part of his estate (1).

NAthaniel Rokeby, about fifty years ago became a freeman of *London*, and had issue by his wife only two children, the defendant *Mary* and the plaintiff *Elizabeth*.

In 1731, the plaintiffs intermarried without the consent of *Elizabeth*'s father or mother, but the father was soon after thoroughly reconciled to the plaintiffs.

Elizabeth never had any advancement from her father, but the defendant *Mary* had upon her marriage with *Edwards* two thousand pounds paid to him, in part of her portion and advancement, and a bond was entered into by *Rokeby* previous to this marriage, conditioned that his executors should upon his death, or sooner after, pay the further sum of two thousand pounds, to be laid out in land, or otherwise, as a provision for *Mary and her issue*,

(1) So *Jenks* v. *Holford*, 1 *Vern.* 61. *Barber*, *ante* 213. *Elliot* v. *Collier*, *post*. *Fowke* v. *Lewen*, 1 *Vern.* 89. *Hearn* v. 528. 1 *Wil.* 169. S.C.

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The bill was brought for *Edwards* to account with the plaintiffs for the personal estate of *Nathaniel Rokeby*. HUME v. EDWARDS.

It was insisted for the plaintiff, that *Mary* having been advanced by her father with 2000 *l.* and 2000 *l.* she ought to bring the same into hotchpot, and the orphanage part of the testator's estate should be divided into moieties, between *Mary* and *Elizabeth*.

It was insisted likewise by the plaintiffs, that notwithstanding, after their marriage, *Nathaniel Rokeby* did in his life-time give the plaintiffs some small sums of money by way of presents on particular occasions, and some other sums, as a recompence and satisfaction for his own, his wife's friends and families boarding and lodging with the plaintiffs, and being entertained by them very often for a considerable time together, (the whole of which presents amounted only to 434 *l.* yet that they were free gifts only of the father, and ought not to be considered as an advancement.

On the other side it was said for the defendant *Edwards* and his wife, that as *Nathaniel Rokeby* did, after the intermarriage of *Hume* with his daughter *Elizabeth*, give to them several considerable sums of money, and a great quantity of houshold and other furniture, amounting to more than 700 *l.* he designed it as an advancement of his daughter *Elizabeth Hume*, and therefore are not intitled to an account of *Rokeby*'s personal estate, *Elizabeth* being fully advanced in his life-time. [451]

And it was insisted further, that if the account is decreed, they are not obliged to account for four *East-India* bonds of *Nathaniel Rokeby*, because in his life-time he wrote a letter on the 11th of *November*, 1743, to the defendant *John Edwards*, and desired he would dispose of four *India* bonds the defendant then had by him of *Nathaniel Rokeby's, and buy the house in Savage Garden, which he thereby wrote he made a present to* (the defendant) *Mary his daughter*; that the four bonds were accordingly disposed of on the 16th of *December* following for 428 *l.* 9 *s.* 11 *d.* and the house agreed for and purchased by the defendant, and conveyed to trustees for the use of the defendant and his heirs in case his wife died in his life-time, but if she survived him, then to her and her heirs.

The defendants insisted, that as this was directed to be laid out in the purchase of a particular freehold estate by the father *Nathaniel Rokeby*, and was laid out accordingly; from the time of its being invested in land, it was no longer subject to the custom of *London*, and therefore are not obliged to account for these *East-India* bonds.

The counsel for the plaintiff as to the *India* bonds argued it was giving only so much money to *Mary*, and the subsequent words, *buy the house in Savage Garden, &c.* was a designation only by *Nathaniel Rokeby*, but not a positive direction to lay it out in land, and therefore the property was not altered, but continued personal estate, and dividable according to the custom.

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If the daughter of a freeman marries against her father's consent, it is of itself a bar to the orphanage share, unless he be afterwards reconciled (1).

Master of the Rolls, (*William Fortescue*, Esq;) The bill is brought by *Hume* and *Elizabeth* his wife to be let into the orphanage share of *Nathaniel Rokeby*'s estate: when he married *Elizabeth*, it was against her father's consent, which is itself a bar to the orphanage share, if the father had not been reconciled, but as that appears fully in proof, the only question is, whether the sums received by the plaintiff the husband after marriage shall be considered as an advancement, and bar her of her orphanage share.

An advancement in marriage is an advancement in full, unless the father by will, &c. written by him and signed, shall declare the value of such advancement.

Wheresoever there is an advancement in marriage, it shall be an advancement in full, unless the father of the child by *his last will and testament, or some other writing by him written, and signed with his name or mark, shall declare or express the value of such advancement. *Eq. Cas. Abr.* 155. *Chace* and *Box* (2).

Sums given by a freeman of *London* to a daughter, if not given as a portion, or in pursuance of a marriage agreement, is no advancement.

In the case of *Fouke* versus *Lewen*, 1 *Vern.* 88. there is a *quære*, "Whether any provision made by the father for his child "be an advancement, or whether only such a provision as is "made on the marriage of the child; but held in the case of "*Jenks* versus *Holford*, 1 *Vern.* 61. that sums of money given "by a freeman of *London* to a daughter, if not given as a mar- "riage portion, or in pursuance of a marriage agreement, is no "advancement."

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In the case of *Chace* versus *Box*, *Eq. Cas. Abr.* 154. the certificate mentions, that an advancement to exclude a child must be in consideration of marriage; and there is no case that a sum of money given by a freeman to his daughter upon any other consideration, is a bar of the orphanage share.

Therefore the plaintiffs are not barred by any of the sums given after marriage, as it does not appear to be on account of the marriage, and as an advancement.

The next question is, what the plaintiffs shall bring into hotchpot: now upon the authority of *Jenks* versus *Holford*, whatever the father gives to such child must be brought into hotchpot.

The general rule is, that whatever a freeman of *London* gives to a child shall be brought into hotchpot.

But there is an exception in this case to the general rule, because the father lived frequently a fortnight or three weeks with the plaintiff and his wife.

Presents made by a freeman to his child after frequently living with her for several weeks at a time, shall be considered only as a satisfaction for her trouble, and not as a gift, to be brought into hotchpot (3).

It is reasonable they should be allowed something for the father's living with them for some time; it is a sort of natural debt from him to a child, and therefore I shall not send it by way of *quantum meruit* to a Master, because I think what pre-

(1) *Fawkner* v. *Watts*, ante 1 vol. 407. *Temb.*

(2) *Vide Fawkner* v. *Watts*, ante 1 vol. 406.

(3) *Morris* v. *Burrows*, ante 1 vol. 403.

sents

ſents the father made ſhould be conſidered only as a recompence and ſatisfaction for their trouble, but refer it to him only to ſee, what the ſums were, that were given by way of ſatisfaction and compenſation for the expence that the father put them to. HUME v. EDWARDS.

The next conſideration is, what muſt be brought by the defendants *Edwards* and his wife into hotchpot?

The 2000 *l.* given in marriage, and the 2000 *l.* ſecured by bond, muſt unqueſtionably be brought into hotchpot.

The only queſtion then is, whether the 400 *l.* *Eaſt-India* bonds ſhall be brought in.

It is a general rule, that ſettling lands by a freeman on a child is not ſuch an advancement as ſhall be brought into hotchpot. [453]

It was inſiſted upon by the plaintiffs, that this is the ſame as giving money, and not an abſolute direction of the freeman to inveſt it in land, and therefore muſt be brought into hotchpot.

On the other hand it was inſiſted by the defendants, and very rightly, that this ſhall be looked on as a purchaſe; for the eſtate was bought in the life-time of the freeman, and though ſettled on one of the children, yet it ſhall not be brought into hotchpot, for the money was the father's, and laid out by his direction in the purchaſe of land.

The ſame rule, which makes it liable while money to be divided according to the cuſtom, takes it out of the cuſtom, when inveſted in land.

Another objection was, that this land ſo purchaſed is not ſettled according to the father's intention, who deſigned it for his daughter's benefit, and her ſeparate uſe.

But whether ſo, or not, is of no avail, becauſe being laid out in lands, takes it out of the cuſtomary eſtate, and therefore not ſubject to be brought into hotchpot; and if improperly ſettled, the court will take care to ſee it carried into execution according to the intention of the parties.

Money directed by a freeman to be laid out in lands for the benefit of a daughter, takes it out of the cuſtomary eſtate, and is not ſubject to be brought into hotchpot (1).

His Honor decreed an account of the teſtator *Nathaniel Rokeby*'s perſonal eſtate.

(1) See *Annand* v. *Honywood*, 2 *Cha. Rep.* 179, 186. *Babington* v. *Greenwood*, 1 *P. W.* 531.

Boteler verſus *Marmaduke and Henry Allington*, *March* 24, 1746. Caſe 156.

THE bill ſtates that *Philip Boteler* being ſeiſed in fee of ſeveral manors, *&c.* and of the advowſon of *Aſton* in *Hertfordſhire*, by his will deviſed the firſt and next preſentation of the ſaid church after his deceaſe, to *Marmaduke Allington*

The defendant, as to ſo much of the bill as ſought to diſcover whether after inſtitution, *&c.* to *A.* he was not preſented to two other livings, and inſtituted, *&c.* demurred, as ſuch diſcovery tends to ſhew an avoidance of *A.* *The demurrer allowed, becauſe he is not obliged by a diſcovery to ſubject himſelf to a forfeiture, or any thing in the nature of a forfeiture.*

and

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and *William Allington*, their executors, &c. and all his manors, lands, &c. to the same persons, and their heirs in trust for the plaintiff for life, remainder to his son *Philip Boteler* for life, remainder to his first and every other sons in tail male, remainder to his own right heirs.

[454] The testator died without issue, leaving *Elizabeth Neville* his only sister and heir at law, who became seised of the reversion and inheritance of the premisses, expectant on failure of issue male of the plaintiff and his son.

Elizabeth Neville by her will devises this reversion to *Henry Allington* for life, with remainder to his first and other sons in tail, remainder to *Marmaduke Allington* in fee.

On the 9th of *May* 1743, the living of *Aston* becoming vacant, the defendant *Marmaduke Allington* presented the defendant *Henry*, who claims the estate in reversion under Mrs. *Neville's* will, and he was instituted and inducted on the 4th of *August* 1743, to this living, which is upwards of 200 *l. per annum*.

On the 2d of *July* 1745, the plaintiff discovered that *Henry Allington* had accepted the livings of *Staingate* and *Swinhope*, by which the living of *Aston* became vacant; and the plaintiff by his bill insisted he had a right to nominate; but that the defendant *Marmaduke* never informed him that the living was become vacant, and in breach of his trust, on the 17th of *October* 1744, presented the defendant *Henry* a second time to the living of *Aston*, and he was admitted by the bishop of *Lincoln* to *Aston*, vacant by his cession, and instituted and inducted the 29th of *October* following.

The plaintiff likewise by his bill insists, that *Marmaduke Allington* had no right to present a second time, and that the defendant *Henry Allington* knew *Marmaduke* had a right only to present on the first vacancy after the death of the testator *Philip Boteler*, as he had seen the wills of *Philip Boteler*, and *Elizabeth Neville*.

And therefore the bill prayed, that *Henry Allington* might set forth, whether he was not instituted and inducted to *Aston* the 4th of *August* 1743, and whether he did not afterwards, and when accept of the living of *Staingate* and *Swinhope*, and was not duly instituted and inducted thereto.

And in regard the time for bringing a *quare impedit* was lapsed, before the plaintiff heard of *Henry*'s being presented a second time to *Aston*, so that he has no legal method of coming at the living of *Aston*, prays that the defendant may be compelled to resign the living, and that such person may be presented as he shall nominate.

The plaintiff annexed an affidavit to his bill, that he had not heard till the 2d of *July* 1745, that the defendant *Henry* had accepted of the living of *Staingate* and *Swinhope*, and that he never knew till that day the defendant *Marmaduke* had presented *Henry* a second time to *Aston*.

The defendant *Henry Allington*, as to so much of the bill as seeks to discover whether, after his institution and induction to *Aston*,

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Aston, he was not presented to *Staingote* and *Swinhope*, and instituted and inducted thereto, demurs, as such discovery tends to shew an avoidance of *Aston*.

And as to so much as seeks to compel the defendant to resign *Aston*, &c. pleads that in *October*, 1744, *Marmaduke Allington* presented him thereto, and that in the same month he was duly admitted, instituted and inducted, and that he has ever since quietly held the living of *Aston*, without any disturbance from the plaintiff, till the filing the bill the third of *May* 1746, by means whereof *Aston* was full of an incumbent for the space of more than *eighteen* months before the filing the bill, or commencement of any suit concerning the presentation, and therefore pleads such *plenarty* in bar to the relief.

By his answer denies he ever saw either the original, or a copy of *Philip Boteler*'s will, or was informed of the contents, till since the bill was filed.

The living of *Aston* is stated to be worth 170 *l. per ann.* and *Staingote* and *Swinhope* together 42 *l.* only.

Mr. Solicitor General for the defendant *Henry Allington*.

The living of *Aston* is above the value of eight pounds in the King's books, and therefore the acceptance of a second living is a forfeiture of the first; and as the defendant, if he should make a discovery of this fact, would subject himself to a forfeiture, he is within the common rule of this court, and may demur to such discovery.

Mr. *Brown* of the same side said, there never was any instance of coming into this court, to have such a question answered, where the person is in the actual possession of the living.

LORD CHANCELLOR,

I take the rule to be, that if a clergyman is in possession of a living of above eight pounds a year in the King's books, and accepts of a second living under that value, it is an absolute avoidance of the first; or if a person in possession of a living under eight pounds a year in the King's books, takes a second living without a dispensation, *the first* is voidable at the election of the patron.

If a clergyman in possession of a living above 8 *l.* a year *in the King's books* accepts of a second under that value, it is an absolute avoidance of the first; if in possession of a living under 8 *l.* in &c. takes a second without a dispensation, *the first* is voidable at the election of the patron.

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Mr. *Wilbraham* of the same side cited *Jones* versus *Meredith* in the Exchequer. Lord Ch. B. *Comyns*'s *Rep.* 661. where to a discovery sought by the bill whether defendants were educated in the popish religion, &c. and thereby incurred the incapacities in the statute of 11 & 12 *W.* 3. they pleaded that act, and it was allowed.

He likewise cited *Monnins* versus *Monnins*, *Reports in Chanc.* 2*d part* 36. where the defendant's demurring to the discovery of her marriage since the death of her husband, as it amounted to a forfeiture, was held good.

Mr. Attorney General for the plaintiff said, this is a discovery of the fact upon which the very right to the presentation

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must depend, and therefore the demurrer of the defendant ought not to be allowed.

LORD CHANCELLOR,

The question as to the demurrer is immaterial, except as to the conformity to the rules of this court, because it is a very easy matter to fix the precise time of admission, institution and induction.

The plea is of more consequence, because I know of no instance where upon an equitable right to a presentation, after the presentee has been in possession six months, which makes a plenarty, that the *cestui que trust* may come into this court to set aside such presentation, upon the general doctrine, that there is no statute of limitations which can affect a trust. The cause was ordered to stand over till the 30th of *March* to look into cases in the mean time.

On that day Mr. *Brown* for the defendant *Henry Allington* cited *Gardiner* versus *Griffiths* in 2 *P. Wms. fol.* 404. the mortgagee of an advowson presented, the mortgagor brought his bill against the presentee seven months after institution to compel him to resign; Lord Chancellor *King* held the bill must be within six months in the same manner as a *quare impedit*, and therefore dismissed the bill as to that part, which seeks to compel the defendant to resign his living.

Mr. Attorney General, counsel for the plaintiff, observed that was a case between a mortgagor and a mortgagee, and the single point of equity was, that the mortgagor is intitled to present.

Here *Marmaduke Allington*, by virtue of the will of Sir *Philip Boteler*, had presented to the *first turn*, after the decease of the testator, who had given him so far a beneficial interest, but upon any other avoidance he had a mere legal right only as a trustee, and the defendant *Henry Allington* knew his uncle [457] was no more, and that he had no right to present, and yet accepted of a presentation from him with notice thereof, and has not denied these facts in his answer.

And there is not a single instance where a trustee is guilty of a breach of trust, but it has been held he shall communicate that breach of trust to the person who takes an advantage from it.

LORD CHANCELLOR,

I am extremely well satisfied with the determination I shall make in this case.

There are two matters in question, one upon *the demurrer* as to the discovery of the acceptance of the second living, and as to that, I am of opinion the defendant had a right to demur, not because it is of any consequence to the plaintiff, for the fact of which he seeks a discovery may very easily be ascertained by the bishop's register, but for the sake of the rule of the court, that a defendant is not obliged by a discovery to subject himself to a forfeiture, *or any thing in the nature of a forfeiture.*

And

And therefore in all bills to stay waste, a plaintiff is not intitled to a discovery, unless he waves the double penalty, which is treble damages by the statute of *Gloucester*.

BOTELER v. ALLINGTON. In a bill to stay waste, a plaintiff is not intitled to a discovery, unless he waves the double penalty.

Nor is a plaintiff intitled to a discovery upon the popish acts, touching the disability of papists (1); it was objected that it ought not to be considered as a penalty, under these acts, but as a limitation over in favour of a protestant heir, but held notwithstanding, the party shall not be obliged to discover, because these acts create an incapacity, which has the same effect with a forfeiture.

Upon the popish acts the plaintiff is not intitled to a discovery, because these acts create an incapacity, which has the same effect with a forfeiture.

A distinction was attempted here, that by 21 *Hen.* 8. *sec.* 9. there is no penalty fixed, but says only that *the first benefice shall be adjudged in the law* to be void.

It has been compared to cases where an estate for life has been determined on the breach of a condition; as where a woman holds only *durante viduitate*, and if she marries, *limited over* (2), so the acceptance of a second, is the determination of the estate in the former living.

The court have made a great difference between a determination by the party himself, and a determination by an act of parliament.

*Suppose the statute of 21 *Hen.* 8. had said, if he accepts a second living, the first shall be absolutely void; this would have been a penalty; but though the act of parliament does not say so in words, yet it amounts to just the same thing, and therefore I think the defendant is not obliged to make a discovery, in order to preserve the rule of the court intire.

If the 21 *H.* 8. had said, by accepting a second living the first shall be absolutely void, it would have been a penalty; but though the act does not say it in words, yet it amounts to the same thing, and the defendants obliged to make a discovery.

Lord *Hardwicke* allowed *the demurrer*. [*458]

The next matter in question is as to a plea of a plenarty of six months, and upwards.

This goes to the point of right.

Marmaduke Allington was intitled to one turn in the presentation of the living of *Aston*, and was a general trustee likewise of the advowson, and whole estate to which it was appendant; and therefore in his own right might present to the first turn: but as to all the rest the *cestui que trust* was intitled to present.

After *Henry Allington* had resigned *Aston*, to accept of two other livings, he was presented a second time to the living of *Aston* by *Marmaduke Allington*.

The bill was not brought till above eighteen months after *Henry Allington's* second presentation to the living of *Aston*, and as a *quare impedit* cannot be sued out after *six months*, where a

(1) *Harrison* v. *Southcote*, *ante* 1 vol. 539. (2) *Lucas* v. *Lucas*, *ante* 260.

parson

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parson has been presented to a living by one who has not a right; for it is the statute of *Westminster* the 2d, 13 *Ed.* 1. c. 5. that makes it a bar; the question is whether the same rule ought to hold in equity.

As a *quare impedit* cannot be sued out after 6 months, where a parson has been presented to a living by one who has not a right, is a rule very proper to be adopted in equity, because it is the general one, that equity follows the law, be it originally a resolution of the common law, or introduced by statute.

I am of opinion in general it ought, for that act was made for the sake of preserving the peace of the church, a very useful law, and rigidly adhered to ever since, and very proper to be adopted in equity, because it is the general rule, that equity follows the law, whether originally a resolution of the common law, or introduced by statute.

* The case in 2 *P. Wms.* 404. is a strong case for this purpose, and a very clear authority.

[459] Then the question will be, if there is any distinction between that case and the present.

The distinction insisted on by Mr. Attorney General, is, as to *Henry Allington*'s notice of *Marmaduke*'s being only a trustee at the time he accepted of the second presentation *to Aston*.

A man might know that *Marmaduke Allington* was a trustee, without knowing that he was guilty of fraud, or a breach of trust, for *Henry* might conceive that *Marmaduke* had a right to present in the capacity of a trustee, and therefore the notice is of no consequence.

But consider how far it would extend, if this distinction was to prevail, that where a man has been guilty of a breach of trust in presenting a parson to a living, no length of time shall avail the presentee to quiet his possession.

A person who has taken a conveyance from a trustee cannot shelter himself under a plea of the statute of limitations.

It is true, the statute of limitations cannot be pleaded against a breach of trust, nor can a person who has taken a conveyance from the trustee shelter himself under a plea of that statute.

But if the rule should hold as to a plenarty, then after the defendant had been in possession twenty or thirty years, the plaintiff might set aside this presentation.

The statute of Westminster the 2d, was intended to secure the peace of the church, and being considered as a statute of limitation, is a bar of an equitable as well as a legal right, and therefore the defendant's plea of a plenarty of six months and upwards was allowed.

For if the statute of *Westminster* the 2d, which is considered here as a statute of limitation, should not be admitted as a bar of an equitable right, as well as a legal, there is no period when you can stop, therefore this doctrine would be of mischievous consequence, and subvert the intention of the statute of *West-*

* One mortgages a manor with an advowson appendant, and the church becomes void, the mortgagee though in possession shall not present to the church till the mortgage is foreclosed; but if the mortgagee of an advowson presents, the bill by the mortgagor must be brought within six months after a *quare impedit*. So determined by Lord Chancellor *King* in *Gardiner* versus *Griffith*, 2 *P. Wms.* 404. N. B. *The bill was dismissed as to that part which sought to compel the defendant to resign his living.* Gardiner versus *Griffith*, 2 *P. Wms.* 404.

minster

minster the 2d, which was to secure the peace of the church; and for this reason I am of opinion the rule of law ought to prevail in this court. BOTELER *v* ALLINGTON.

Having said this with regard to the rules of law and equity, I will go a little further as to the circumstances of this case, that this is not such a one as a court ought to strain in favour of the plaintiff, for his chance of presenting is exactly the same, as *Marmaduke*'s first presentation was undoubtedly good, and there is no prejudice to the plaintiff in his presenting *Henry* a second time, because, upon the death of *Henry*, the plaintiff's right of presenting accrues equally as if *Henry* had never been presented but once to this living. *Lord Hardwicke allowed the plea.*

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Westfaling versus *Westfaling and others*, *March* 5, 1746. Case 157.

An advowson in gross will not pass by the word *lands*, but by the words tenements and hereditaments it will.

HERBERT Rudhall Westfaling deceased, had several kinds of estates of inheritance, consisting of freehold and copyhold, *and also the advowson in gross of* Linton, *and likewise estates per auter vie*, and was possessed of a considerable personal estate; some of the estates were in settlement, and others subject to his disposition, and being so seised made his will, and thereby devised all his leasehold land, situate at *Hampton Bishop*, to trustees and their heirs, on trust to permit the defendant *Philip Westfaling* to receive the rents during his life, and after his death, the first and other sons of *Philip* to receive the rents thereof, and for want of such issue, to the defendant *Herbert Westfaling* and his heirs, and by his will devised to the trustees all his freehold lands not under settlement, and whereof he was any way seised or possessed of, or any way interested in law or equity, either in possession, reversion, or remainder, *which he had any power to devise or dispose of*, *and also all and singular his leasehold estates* and lands whatsoever, excepting only such as are herein before devised, that they should by mortgage, or otherwise, of all or any part of the leasehold or freehold estate, secure to his daughter 3000*l.* and interest, and subject to this to *Herbert Westfaling* for life, remainder to his first and other sons in tail male.

The testator at the time of his death was indebted in large sums of money by specialty and otherwise.

The bill was brought by the testator's daughter for her legacy, and by *James Clarke*, a creditor by simple contract, for an account of the personal and real estate of the testator, and that the personal estate may be applied in a course of administration, and if not sufficient, that the real assets may be sold, and applied in such proportion, order and priority, as in justice to all the defendants it ought to be applied, for payment of the testator's debts.

Mr. *Brown*, for the plaintiffs, argued, that by the words *all his freehold lands*, the advowson, though an incorporeal inheritance will pass, and cited two cases, *How* versus *Coney*, 1 *Leon.* 180. where it was held a reversion passed by the word *lands*, and *Stiles* 261, 278. similar case, where by the words *fee-simple lands*, a portion of tithes was held to pass.

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But if it does not pass by the will, he insisted it was assets to pay debts.

Lord *Hardwicke* mentioned the case of *Robinson* versus *Tonge* (1), *Michaelmas* term 1730, determined by *Lord Chancellor King*, and afterwards affirmed in the House of Lords, that in equity
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an *advowson descended upon the heir is assets*, for payment of debts of the ancestor, because here you may pray a sale, but at law it is not extendible. *Vid. Vin. Abridg.* title Assets, *p.* 145. *Pl.* 28.

Mr. *Evans* of the same side said that in *Co. Lit.* 374. *b.* an advowson is held to be assets.

Lord *Hardwicke* said, but it is not held by Lord *Coke* to be assets to pay debts, but to support a warranty, and the reason is, that the total estate passed.

Mr. *Brown* then insisted, that the devise of the estates *pur auter vie* to *Philip Westfaling*, was within the statute of 3 *W.* & *M.* for relief of creditors, and that they are assets for payment of debts, and that they are comprised under the general words estates a person *hath power to dispose of by his last will*, and that whatever would have been assets in the hands of the heir, shall be so in the hands of the devisee.

Here is an estate limited to the late Mr. *Herbert Rudhall Westfaling* for three lives; he had a power to devise it away; if he did not, it would have been assets in the hands of his heir, and therefore it shall be so in the hands of the devisee.

Mr. Solicitor General for *Philip Westfaling*.

Whether the estates devised to him are to be considered as assets, will depend upon the construction of the statute of fraudulent devises.

Before the statute of 32 *H.* 8. *c.* 1. of *Wills*, and 34 & 35 *H.* 8. *c.* 5. no lands were devisable which gives a power that every man who had lands, tenements and hereditaments might devise, but is plainly confined to fee-simple, and not intended to life estates, for they were capable of being seised by the first occupant.

The next alteration in respect to wills, was by the statute of frauds and perjuries, 29 *Ch.* 2. *c.* 3. *s.* 5. which gives a power of devising estates *per auter vie*, as well as estates in fee-simple under the same ceremonies, and if there is no devise, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, *as assets by descent*, and if no special occupant, it shall go to the executors or administrators of the party, that had the estate thereof by virtue of the grant, and shall be assets in their hands.

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The owner of lands might have devised them so as to disappoint his heir or specialty creditors, till the statute of *fraudulent devises*, 3 & 4 *W.* & *M.* *c.* 14. the mischief recited there is, that persons might dispose of their lands, tenements and hereditaments by will or apppointment, in such manner as to the defraud their creditors. The

(1) 3 P. W. 398. 401.

The ſtatute means by lands, tenements and hereditaments, the things, and not the intereſt the perſon had in them. WESTFALING v. WESTFALING

I am aware the general words *or had power to diſpoſe of* will be inſiſted on by the other ſide, to take in all eſtates he had a power to diſpoſe of; but plainly eſtates, for life are not in the meaning of the legiſlature, for the caſe put by the ſtatute of frauds is a deſcent to the heir, by reaſon of a ſpecial occupancy, but the power of deviſing ſuch eſtates is not taken away.

Lord *Hardwicke* ſaid, they are made in the nature of perſonal aſſets, and it is ſuch a power to diſpoſe as a teſtator has over perſonal aſſets, and all the determinations are upon this footing.

Mr. Solicitor General inſiſted, ſecondly, that the advowſon did not paſs by the will, eſpecially as it is *an advowſon in groſs*, becauſe this is an incorporeal inheritance.

The words of the will are lands, tenements, and leaſehold eſtates, and the word *lands* will not carry the inheritance; all his freehold lands ſeem to be in oppoſition to other ſort of eſtates; and lands have never been conſtrued to take in the intereſt a man has in any eſtate.

Lord *Hardwicke*: I apprehend it has been held, that the word *land* will paſs *the demeſnes of a manor*, and as a manor cannot be ſeparated from it, therefore it will paſs likewiſe.

Mr. Solicitor General then ſaid, Suppoſe a man has rent-charges, rent-ſervices, and lands, and he deviſes *his lands*, this is in contradiction to his other tenures, and they will not paſs by the word *lands*.

Mr. *Parrot* of the ſame ſide, as to the caſe cited by Mr. *Browne* out of *Stiles*, that a portion of tithes paſſed by the word *lands*, there was nothing belonging to the teſtator in this place but theſe tithes, and therefore, rather than the will ſhould be ineffectual, it was held they paſſed, but the rule of law is, if there are eſtates which properly paſs by the words of the will, it ſhall not be extended to ſuch eſtates that do not properly paſs by the words.

Mr. *Noel*, counſel for the defendant *Herbert Weſtfaling*, in ſtating the caſe of *Robinſon* verſus *Tonge*, ſaid, it was an equitable eſtate in the advowſon, that deſcended on the heir at law, and could not be come at without the interpoſition of this court; but there is no caſe can be cited where a court of law has determined a legal intereſt in an advowſon to be aſſets. [463]

Mr. *Wilbraham*, of the ſame ſide, ſaid there was no authority that by the deviſe of all *freehold lands*, an advowſon will paſs; in *Hob.* 303. It was held, that by a deviſe of tenements it will paſs, but not of lands only.

As it does not paſs then under the will, the queſtion is, whether, as it is a bare deſcent from anceſtor to the heir, it ſhall be aſſets to pay debts.

If it ſhould be your Lordſhip's opinion, that the caſe of *Robinſon* verſus *Tonge* was ſomething particular, as being the truſt of an advowſon, and that it does not extend to a legal intereſt in in advowſon, then it does not affect the caſe.

An advowſon yields no ſort of profit to the owner; I do not know in what manner a court of law can extend an advowſon, if the owner of it has no other eſtate.

To ſay that this court has a power of ſelling an advowſon, unleſs it determines firſt that it is aſſets, is begging the queſtion, and therefore, unleſs this point is firſt ſettled, the court has no juriſdiction, as being a mere legal right.

As to the eſtates *pur auter vie* being aſſets, he cited the Duke of *Devonſhire* verſus *Hilton*, 2 *Vern.* 1719. and *Oldham* verſus *Pickering*, *Salk.* 464. where, by the declaration of Lord Chief Juſtice *Holt* in that caſe, it ſeems as if he thought the ſtatute of frauds and perjuries had ſtamped them aſſets for payment of debts.

If this be a full declaration that they are aſſets, then they could not be deviſed away.

On the 12th of *April*, 1747, this cauſe ſtood for judgment.

LORD CHANCELLOR,

There are two queſtions, which are queſtions of law.

Firſt, Whether a part of the eſtate of *Herbert Rudhall Weſtfaling*, called *the advowſon of Lenton*, paſſed by his will; or if it [464] did not, whether it is to be conſidered as aſſets by deſcent, as being an advowſon in groſs?

The ſecond queſtion is, Whether eſtates *pur auter vie* are within the ſtatute of fraudulent deviſes, and liable to pay the debts of the teſtator?

As to the firſt, I am extremely clear, it did not paſs by the will, there is no authority that *an advowſon* will paſs by the word *lands*, though it will by the words *tenements* and *hereditaments* (1).

Being then not deviſed, this brings it to the queſtion, whether, as ſubſiſting in a legal eſtate, and no truſt, it is aſſets? And I am clearly of opinion it is, and ſo determined in *Robinſon* verſus *Tonge*.

It is pretty extraordinary, how it came ever to be doubted whether it was aſſets.

In the caſe of a debt by ſpecialty, where there is judgment againſt the heir, it is to recover to the value of the land: it is laid down by *Fleta, lib.* 2. *cap.* 65. and *Co. Lit.* 374. that an advowſon is aſſets to ſatisfy a warranty, and there are no negative words that it is not aſſets to ſatisfy a bond debt, and ſeems to be a diſtinction without a difference to ſay it is not.

The notion of its not being aſſets ſeems to have been taken up from a ſaying of Lord Chief Juſtice *Anderſon*, in the caſe of *Cleer* verſus *Peacock*, *Cro. Eliz.* 359. his words are, *although it may be holden, and is aſſets in a formedon, yet it is not aſſets in debt, for it is not of an annual value, and ſo cannot be deviſed*; but three judges *Walmſley*, *Beamond* and *Owen* held, *that it is well deviſable, for the body of the act is, that lands, tenements and hereditaments may be deviſed, and this is an hereditament.*

(1) *Haſlewood* v. *Pope*, 3 *P. W.* 322.

If it may be extended for the king, which goes upon the same reason and foundation, what colour is there to say it should not be so in the case of bond creditors?

Soon after the case of *Cleer* versus *Peacock*, there came cases which strongly import the contrary opinion. *Sir Will. Jones* 23, 24. and so it stood till the case of *Robinson* versus *Tonge*, in the House of Lords, *March* 23, 1730.

It has been said, the authorities go no further than where there has been a trust of an advowson, but do not extend to a legal interest in an advowson; this argument is quite cut up by the roots by the determination in the House of Lords.

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An advowson in fee in gross, is assets by descent to satisfy bond creditors (1).

In the minute-book of that day, it is taken down that the question proposed to be asked of the judges was, Whether an advowson in fee was assets; it must have been defectively taken by the clerk, for the question intended was, *Whether an advowson in fee in gross* was assets; for there could be no doubt as to an advowson, appendant to a manor, because the manor itself being assets, what is appendant must be assets likewise.

The judges who gave their opinion were, Lord Chief Justice *Eyres*, Baron *Price*, and Baron *Comyns*; and Lord *Raymond* being consulted upon it afterwards, declared himself of the same opinion.

I am therefore of opinion it is *assets by descent to satisfy specialty debts*.

The second question was, as to *the leasehold estates pur auter vie* devised to *Philip Westfaling*.

It has been insisted for the plaintiffs, that if the personal estate, and the real estate descended, are not sufficient to satisfy the debts, that the leasehold estates are liable on the construction of the statute of fraudulent devises, which makes a devise void against creditors.

I am of opinion *the statute does make it void*.

An estate *pur auter vie*, though it is devised, will be liable to debts by specialty, to contribute in a course of administration, according to the given value.

There are two statutes to be considered; first, the statute of frauds and perjuries, 29 *C.* 2. "And for the amendment of "the law in the particulars following; Be it enacted, that from "henceforth any estate *pur auter vie* shall be deviseable by a "will in writing, signed by the party so devising the same, or "by some other person in his presence, and by his express di- "rections, attested and subscribed in the presence of the de- "visor by three or more witnesses; and if no such devise thereof "be made, the same shall be chargeable in the hands of the "heir, if it shall come to him by reason of a special occupancy, "as assets by descent, as in case of lands in fee-simple; and in "case there be no special occupant thereof, it shall go to the "executors or administrators of the party, who had the estate "thereof by virtue of the grant, and shall be assets in their "hands."

The effect of this statute is to make these estates deviseable, which were not so by the statute of 21 *H.* 8. *of Wills*.

(1) *Robinson* v. *Tonge*, 3 *P. W.* 401. 3 *Bro. P. C.* 556. 2 *Stra.* 879. *Kynaston* v. *Clarke, ante* 2 vol. 206.

Then

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Then comes the third and fourth of *W. & M. c.* 14. for relief of creditors againſt fraudulent deviſes.

Lord *Hardwicke* read the preamble and the firſt enacting clauſe, "That all wills, *&c.* of manors, meſſuages, lands, tenements or hereditaments, *&c.* whereof any perſon at the time "of his deceaſe *ſhall be ſeiſed in fee ſimple* in poſſeſſion, reverſion "or remainder, *or have power to diſpoſe* of the ſame by his laſt "will or teſtament, ſhall be deemed as againſt bond or ſpecialty "creditors to be fraudulent, and clearly, abſolutely and utterly "void, fruſtrate and of none effect."

It depends upon theſe words, *whereof any perſon is ſeiſed in fee, or have power to diſpoſe of.*

Moſt clearly teſtators have a power to diſpoſe, ſuch power being given them by an antecedent ſtatute, 29 *Ch.* 2.

Then what ground is there for the court to make a limited ſtrained conſtruction, and narrower than the words, upon a ſtatute made for preventing *fraud?*

Mr. Solicitor General's principal objection was, that to conſtrue eſtates *pur auter vie*, if it ſhould come to the heir as *a ſpecial occupant* to be aſſets, would be to make a partial and imperfect proviſion under the ſtatute, as it does not take in *other eſtates pur auter vie* where *the heir* is not made the ſpecial occupant.

Now as to that, it is but a precarious and doubtful argument to conſtrue one thing not to be within the ſtatute, becauſe another is not: Suppoſe there is *caſus omiſſus* in the act, there is no reaſon why what is expreſſed within the ſtatute ſhould not have its effect.

It is true, indeed, the caſe ſuppoſed by the ſtatute is, where there is no ſpecial occupant, and no deviſe; but then the ſtatute directs it ſhall go to the executors or adminiſtrators of the party that had the eſtate thereof, by virtue of the grant, and ſhall be aſſets in their hands, and has the ſame effect as if it had been granted to the grantee, his executors or adminiſtrators, and in this caſe the executor is as *a ſpecial occupant* for that purpoſe.

How did the law ſtand before the making of the ſtatute, as to a leaſe *pur auter vie* to *A.* his executors or adminiſtrators. 2 *R. Abr.* 151. *Tit. Gr. pl.* 2.

"If a man leaſe to another and his executors, land for the "life of *J. S.* and *ceſtui que vie* dies, the executor ſhall be a "ſpecial occupant, notwithſtanding it is a *freehold* (1)."

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Where a man takes an eſtate as an executor, it is aſſets, for as an executor of a teſtator he can take nothing without being ſo.

If a man takes an eſtate as an executor, it is aſſets, for he cannot take any thing as an executor of a teſtator without being ſo; and Lord *Cowper* was of that opinion in the caſe of the *Duke of Devonſhire* verſus *Kinton*, 2 *Vern.* 719. "for he ſaid,

(1) *Carth.* 376. But ſince the ſtatute 14 *Geo.* 2. *c.* 20. *ſ.* 9. it ſhould ſeem, that an eſtate *pur autre vie*, when limited to *executors*, muſt be conſidered, not as a *freehold*, but as *perſonal* eſtate to all intents. *Vide Williams* v. *Jekyl*, 2 *Veſ.* 681. 683, 684. 4 *Term Rep.* 230.

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"he took it that before the statute of frauds and perjuries, if an "estate *pur auter vie* came to an executor or administrator, it would "be assets," and decreed it accordingly.

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Now if before the statute of frauds and perjuries, granting an estate *pur auter vie* to *A.* his executors or administrators, would have made it assets, can devising it to them prevent its being liable? Certainly not, for the reason before mentioned, that taking as executors, they must take it as assets.

As before the statute of frauds &c. granting an estate *pur auter vie* to *A.* his executors, &c. would have made it assets, devising it to them makes it equally so.

Therefore I am of opinion, that *an estate pur auter vie*, though it is devised, will be liable to debts by specialty, to contribute in a method of distribution, according to the gross value.

"Lord *Hardwicke* declared, that the advowson of *Linton*, not "being comprised in the devise of the testator's will, ought to "be considered as real assets descended to the defendant *Herbert* "*Westfaling*, the testator's heir at law, subject to the testator's "debts by specialty; and ordered the same to be sold, and the "money arising by such sale to be applied in payment of so much "of testator's debts by specialty, as his personal estate will "not extend to satisfy; And in case the the testator's personal "estate, and the money arising by sale of the advowson, shall "not be sufficient to satisfy the testator's debts, then his Lord-"ship declared the residue of the testator's debts by specialty are "well charged on the testator's freehold estates, whereof he was "seised in fee either in law or equity, and also on his lease-"hold estates *pur auter vie* devised by his will, and ought to be "borne proportionably in average between those estates: And "his Lordship doth declare, that the equity of redemption of the "estates in mortgage ought to be considered as part of the testa-"tor's real estate, which passed by the testator's will to his trustees: "And further ordered, that the freehold estates in fee and lease-"hold estates, or a sufficient part thereof, to be settled and ap-"portioned by the Master between the estates, according to the "respective gross values thereof, be sold, and that the money "arising by such sale be applied in the first place in payment of "the testator's debts by specialty, as shall not be satisfied by the "other funds before mentioned, *pari passu*. And in case any "specialty creditors shall exhaust any part of the personal estate, "then his simple contract creditors are to stand in their place, "and receive a satisfaction *pro tanto*, out of the money arising by "the sales aforesaid, and that the residue of the purchase-money "be applied in payment of what shall be found due for prin-"cipal and interest of the plaintiff *Mary*'s legacy of 3000*l.* and "other the legacies secured on the testator's real estate; and if [468] "there shall be any surplus thereof, the same to be laid out in "land, to be settled to the same uses respectively as the lands "from whence it arose ought to have been settled or gone (1)."

(1) *Reg. Lib. B.* 1746. fol 569.

Case 158. *Maynard* versus *Pomfret, at the last Seal after Hilary Term, March,* 27, 1746.

Where a defendant for want of putting in his answer has stood out the whole process of contempt to a sequestration, and the bill taken *pro confesso* on a decree against him *ad computandum*, the court will not discharge the sequestration on paying the costs of the contempt only, but will keep it on foot as a security to the plaintiff, for the defendant's appearing before the Master to take the account.

A Bill was brought against the defendant for a discovery; as the material part of the case depended upon the discovery, the defendant would not answer, but stood out the whole process of contempt to a sequestration, and the bill was taken *pro confesso*, and there was a decree against the defendant *ad computandum*.

It was moved on behalf of the defendant, that the sequestration may be discharged on paying the costs of the contempt.

Lord Chancellor,

Paying the costs of the several processes, *ten shillings for one* or *twenty for another*, is not clearing the contempt, for the contempt is the not putting in his answer, which is not in the defendant's power to do now, after the cause has been set down and the decree made.

It was said for the defendant, that this differs from the case where a certain duty is decreed upon a bill taken *pro confesso*, because there the estate may be sold, and the money arising from the sale applied to discharge it, pursuant to the decree; but here, as it is a decree *ad computandum*, it may be presumed till the account is taken, that the defendant may have a balance in his favour, and therefore, on paying the costs, the sequestration ought to be discharged.

This is a pretty hard presumption in favour of the defendant, after he has stood out the whole line of the process, rather than submit to answer; but if I was to discharge this sequestration, I should do a manifest injustice, and make the process of the court intirely ineffectual, and the defendant would have his ends of the contempt, in not putting in his answer, for he would refuse attending the Master to take the account, and the plaintiff by that means lose the fruit of his decree; and therefore as I am of opinion the costs are consequential of his contempt, and not the contempt itself, I shall not discharge the sequestration, but keep it on foot as a security to the plaintiff for the defendant's appearing before the Master to take the account.

April 1, 1747. *De Grey and others, Executors of Hardwicke Sewell,*	Plaintiffs.	
Plampin Richardson and others,	Defendants.	
Plampin Richardson,	Plaintiff.	
De Grey and Hardwicke Sewell Richardson, and Alice Richardson and others,	Defendants.	Case 159.
Hardwicke Sewell Richardson,	Plaintiff.	
Plampin Richardson and others,	Defendants.	

Lands on which there were leases for years existing, and a rent incurred descended on a wife as tenant in tail general who survived three months after the rent-day incurred; though she made no entry, nor received any rent during her life, yet this was such a possession in the wife as made the husband tenant by the curtesy.

THE first bill was brought by the executors of *Hardwicke Sewell* to establish his will, and the trusts thereof. The second bill states, that by virtue of a settlement made in 1699, on the marriage of the father and mother of *Hardwicke Sewell*, and in 1703, the estates therein mentioned descended on him as their son and heir in tail, that on the 27th of *November* 1742, he died without issue, and upon his death the estates descended on the plaintiff's wife *Alice* the sister of *Hardwicke Sewell* as heir in tail general under the settlement: *Alice* died the 19th of *August* 1743, leaving two children, the defendants *Hardwicke Sewell Richardson*, and *Alice Richardson*, and the plaintiff insists that he is intitled as tenant by the curtesy to the possession of these estates, his wife being in her life-time, and at her death, seised thereof, and leaving such issue as aforesaid, and therefore prays to be let into the possession thereof, and to receive the rents for his life (1).

Hardwicke Sewell Richardson, plaintiff in the third bill, and son of *Plampin Richardson*, insists that *Alice* his mother was never seised of these estates, nor did she, or her husband *Plampin Richardson* in her right, take possession thereof, or receive any part of the rents, and therefore he is not intitled to be tenant by the curtesy: Prays an account of the rents and profits of the estates from the executors of *Hardwicke Sewell*, and that they may be placed out at interest till he comes of age.

The rents under the leases were payable at *Michaelmas* and *Lady-day*, but the tenants being greatly in arrear at the death of *Hardwicke Sewell*, *Alice Richardson*, the sister of *Hardwicke Sewell*, did not receive any of the *Lady-day* rent notwithstanding she lived four months beyond that time, nor did any other person receive it in the life-time of *Alice* (2).

Mr. *Wilbraham* counsel for *Plampin Richardson*, who claims to be tenant by the curtesy, cited the following authorities in support of his claim. *Co. Lit.* 29. *a. ch.* 4. *sec.* 35. title *Curtesie*

(1) And an account of rents and profits.

(2) The trustees under the will in their answer to the second bill, say, that upon *Hardwicke Sewell's* death, they entered upon and took possession of all the estate devised to them by his will (which include the lands in question), apprehending that he had full power to dispose of the same, *and continued in the receipt of the rents*. See post 472.

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d'Engleterre; in the comment it is said, there is a seisin in deed, and a seisin in law, and here *Littleton* intendeth a seisin in deed *if it can be attained unto*; a man seised of an advowson or rent in fee hath issue a daughter, who is married and hath issue, and dieth seised, the wife, before the rent became due, or the church became void, dieth; she had but a seisin in law, and yet shall be tenant by the curtesy, *because he could by no industry attain to any other seisin, and impotentia excusat legem.*

He cited likewise *Co. Lit.* 15. *b.* *Id. sec.* 350. and *Moore* 125. *Trin.* 23 *Eliz. Rot.* 1229. and *Symonds* versus *Cudmore*, *Carth.* 260.

Mr. *Noel*, counsel for *Hardwicke Sewell Richardson* the son, against the claim of tenancy by the curtesy, said, that to intitle a man to be tenant by the curtesy, there must be an actual seisin of the husband, or by receipt of rents in the life-time of the wife, unless in the case mentioned by Lord *Coke* in his comment upon *Lit.* 15 *a.* which is the case of *possessio fratris*, and distinguished by him from all other cases.

He cited *Sterling* and *Pendleton* (1) before Lord *Hardwicke*, where his Lordship held there must be an actual entry to make the husband tenant by the curtesy.

Mr. *Weldon* of the same side cited *Co. Lit.* of dower, *sec.* 52. "In every case where a man taketh a wife seised of such an estate of tenements, &c. as the issue which he hath by his wife may by possibility inherit the same tenements of such an estate, as the wife hath, *as heir to the wife*: In this case, after the decease of the wife, he shall have the same tenements by the curtesy of *England*, but otherwise not: *Co.* in his comment says, *as heir to the wife* doth imply a secret of law, for except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife; and this is the reason that a man shall not be tenant by the curtesy of a seisin in law."

Lord Chancellor,

This is a matter of great consequence to husbands, as most of the lands in *England* are let out upon leases for years, and tenants extremely backward in paying their rents, and as a wife may have a right for a year or two, or no actual entry made, it would be hard for this reason to prevent a tenancy by the curtesy.

The question is a question of law, whether where lands on which there are leases for years existing, and a rent incurred, descend on the wife as tenant in tail; and she survives three months after the rent-day incurred, but has made no entry, nor was there any rent paid during her life, is such a possession of the [471] wife, as will make the husband *tenant by the curtesy*?

It has been insisted on one hand, that there must be a seisin in deed.

And on the other hand, that if the seisin in deed cannot be attained unto, the law excuses it; and therefore the case put by

(1) 7 *Vin. Ab.* 149. *pl.* 11. S. C.

Lord

Lord *Coke* will afford a good deal of argument on the present case: *A man seised of an advowson or rent in fee hath issue a daughter, &c. Co. Lit.* 29. *a.* De Grey v. Richardson.

To go by steps, here is an estate of which the brother was seised in tail, descends upon the sister in tail general; the possession of the lessee was the possession of the brother, and he undoubtedly died seised, afterwards the sister became seised.

Supposing she had died before *Lady-day*, I should have had no doubt but the husband would have been tenant by the curtesy, because he could do nothing till rent-day came; for the law never requires a man to become a trespasser.

The husband would have been tenant by the curtesy if the wife had died before the rent-day came.

Lord *Coke* says in his comment on the 8th section of *Littleton*, 15. *a.* "If the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term "before entry or receipt of rent; the younger son of the half "blood shall not inherit, but the sister, because the possession "of the lessee for years is the possession of the eldest son, so "as he is *actually seised* of the fee simple, and consequently the "sister of the whole blood is to be heir."

There is not a stricter case than this of *possessio fratris*, and yet you observe Lord *Coke* says, that if the eldest son die before entry, or receipt of rent, the sister shall inherit.

Actually seised is the same thing as seisin in deed; then why was not the wife in this case actually seised?

Mr. *Noel* in answer to this refers to the next page in *Co. Lit.* 15. *b.* "What then is the law of a rent, advowson, or such "things as lie in grant? If a rent or an adowson do descend to "the eldest son, and he dieth before he hath seisin of the rent, "or present to the church, the rent or advowson shall descend "to the youngest son, for that he must make himself heir to his "father: and therefore, says Mr. *Noel*, there ought to have "been *an actual seisin* of the rent, or *Plampin Richardson* could "not be intitled to be *tenant by the curtesy*."

But the consequence I draw from it is different from what Mr *Noel* does; for in the same section he saith, "This case "differeth from the case of the tenancy by the curtesy; for "there, if the wife dieth bef[illegible] the rent-day, or that the "church become void, becaus[illegible]ere was no laches or default "in the husband, nor possibility to get seisin; the law, in re- "spect of the issue begotten by him, will give him an estate by "the curtesy of *England*," so that you observe the case of tenant by the curtesy is considered more favourably than a *possessio fratris*, for a *possessio fratris* is *facit sororem esse hæredem* requires some act to be done to make her heir. [472]

Then all that remains in the present case is the laches in not receiving or distraining for the rent that became due at *Lady-day*.

The receipt of rent would have amounted to evidence of an actual seisin, and if the trustees under the will of the brother had received any rent in the life-time of the wife, would have been a material objection (1), but no rent has been received that

(1) See *ante* 469 note 2.

has incurred after the death of the brother either by the wife or any person against her; and therefore is a very strong case, to make the husband a tenant by the curtesy, as the possession of the lessee was the possession of the wife, and there could be no other without making the husband a trespasser.

Lord *Hardwicke* "declared the will of *Hardwicke Sewell* to be "well proved, and that it ought to be established, and the "trusts thereof performed, and decreed the same accordingly: "and as to the testator's real estate, he ordered the Master to "inquire what part thereof was comprised in the two settle-"ments dated the 26th of *February* 1699, and the 13th of "*August* 1703, and what particular parts of the testator's es-"tate descended to *Alice* the late wife of the defendant *Plam-"pin Richardson*, the mother of the plaintiff *Hardwicke Sewell* "*Richardson*, in tail, and what particular parts of the estate "passed by the testator's will to his trustees: and also to in-"quire what parts of the lands which descended to the defend-"ant *Plampin Richardson*'s wife in tail were at the testator's "death standing out on any lease or leases for years, and of "what particular part of such estate the testator died seised in "actual possession, and to state the same: and his Lordship "doth declare that he is of opinion, that the defendant *Plam-"pin Richardson* is intitled to be tenant by the curtesy of all "such lands as descended to his late wife in tail, whereof "any leases for years were existing at the testator's death, "which continued till the death of his wife; but that he is "not intitled to be tenant by the curtesy of any part of such "lands, whereof no such leases for years were existing and "continuing as aforesaid (1)."

(1) *Reg. Lib.* A. 1746. fol. 619.

[473] *April*, 4, 1747, *Doctor Winne, Canon Residentiary of the Church of Sarum*, —— } Plaintiff.

Bampton, Sayer, and others, Canons of the same Church, —— —— } Defendants.

Case 160.

Though a dean and chapter are reasonable in the fines they demand, if an accident delays the lease, which has not happened from their fault, or from the tenants, yet if it is not completed till after a new member comes in, he shall have his proportion.

IN the church of *Sarum* there are a dean and six canons, who grant and renew leases, and divide the fines into seven parts, if the lease is made when the number is complete, but if during a vacancy, then among the dean and residentiaries, according to their number existing.

On the 28th of *October* 1738, Doctor *Eyres*, one of the canons, died, and there were only five canons besides the dean, and so continued till the 27th of *June* 1739, when the plaintiff was elected.

About the time of the plaintiff's election Mr. *Stiles* being willing to renew two leases for lives of the manor of *Melksham*, agreed with the canons for a fine of 1050*l.* and, in *November* 1739,

delivered the old leafes to the defendant *Sayer* to be furrendered, to enable the dean and chapter to make new leafes when the agreement fhould be completed; and the dean and chapter on the 12th of *November* 1739 granted him two leafes accordingly, to him and his heirs, to hold for three lives, and at the fame time a licence of alienation was granted him, and leafes and licence were executed, and paffed the common feal, after the plaintiff was admitted a canon, fo that he became intitled to a feventh part of the 1050 *l.* fine, being 150 *l.* but the whole was received by the dean and the other five canons, which was 25 *l.* each more than they were intitled to.

The dean and one of the canons, on an application to them by the plaintiff, paid him 25 *l.* each, but the four other canons refufed, and therefore the bill prays that they may account with the plaintiff for the feventh part of the fine.

The defendants infift, that in *April* 1739, long before the plaintiff's election, Mr. *Stiles* applied to the dean and chapter of *Sarum* to renew, and on the 19th of *May* paid 1050 *l.* to the defendant, which, amounting to 175 *l.* a piece, was foon after divided, as it is ufual to divide fines, in confideration the dean and chapter on the 26th of *June*, the day pre plaintiff's election, fealed two leafes, whereby they d Mr. *Stiles* and his heirs the manor of *Melkfham* for three which were left in the defendant's hands, to be delivered to Mr. *Stiles*, when he furrendered the old leafes, which were not furrendered till the 8th of *November* 1739, and the defendant *Sayer*, to whom the whole care was left of finifhing this affair, altered [474] the date of the leafes while they were in his keeping, by inferting the date of the 12th of *November* inftead of the 26th of *June*, merely to make the date of the leafes fubfequent to the date of the furrender of the 8th of *November*; and the defendants infift that the agreement entered into and figned with Mr. *Stiles* for the purchafe of the leafes, and payment of the fine, and the dean and chapter's fealing new leafes, amounted to a furrender of the old, and that the furrender of the 8th of *November* was unneceffary, and confequently the leafes of the 26th of *June* immediately took effect on the fealing of them, and that the refealing on the 12th of *November* was at the requeft of Mr. *Stiles*'s agent, and that the dean and chapt complied only to fatisfy his fcruples, and therefore the refealing after the alteration of the date amounted to no more than a confirmation of what was before effectual and valid; that the agreement with Mr. *Stiles* for granting leafes was fully carried into execution on his part, by paying the fine in *May* 1739, and that the dean and chapter and refidentiaries, at the time the agreement was made and fine paid, were alone intitled to divide the fine.

It appeared in evidence, that thefe leafehold eftates were in mortgage to Mr. *Edwin*, and that one of the lives dying, application was made, on behalf of Mr. *Stiles* and the mortgagee, to the defendant *[illegible]er*, for renewing them, by adding a new life or lives; and by his order the chapter clerk made two fets of

of leases, one in Mr. *Stiles*'s and the other in Mr. *Edwin*'s name, and both were sealed together on the 26th of *June* 1739; and at the time of the sealing, the chapter clerk observed to the dean and two of the canons, that he thought it irregular to seal two leases of the same premisses to different persons, and swore that he afterwards saw the two leases, with a rasure appearing in the date, which was altered and made to bear date the 12th of *November* 1739, instead of the 26th of *June*, and that the leases with this rasure were in the hands of the defendant *Sayer*; and afterwards, in *August* 1740, resealed at the request of Mr. *Stiles*'s agent, he being dissatisfied with the lease having been altered. Doctor *Clark* the dean swore he apprehended the reason, inducing the defendant *Sayer* to make such alteration, might be to secure the whole fine paid on the renewal of such lease to the rest of the chapter, exclusive of the plaintiff. Mr. *Stiles* in his examination swore, that about the 17th of *May*, 1739, he gave directions to pay the dean 1050 *l.* as a fine for renewing the leases, but did not remember it ever came under his consideration when or how the dean and chapter should divide the money, but that he could not but look on it as a deposit in their hands, for which he was to have new leases, as soon as things

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were ripe for the execution and delivery, and that the reason of his directing the money to be paid so incautiously, was owing to the pressing instances of the defendant *Sayer*, who frequently by letters urged him, as on the part of the dean, to the speedy performance of the agreement, or else that the dean and chapter would not think themselves bound to stand to it.

Lord Chancellor,

The general question is, Whether the plaintiff, as a canon residentiary of the church of *Sarum*, is intitled to a share of the fine of 1050 *l.* with the dean and other canons as a *residentiary existing*, and having a right at the time.

No interest can pass out of a corporate body at law but under the common seal.

It must be admitted to be the general rule, that where a lease is made by these corporate bodies sealed under the common seal (for no interest can pass out of them at law, but under the common seal) they are intitled to divide the money arising from the fine in equal proportions amongst them in some cases, and in others, the dean has a double share to the rest of the chapter.

The first question is, when the lease was really and effectually made in law to Mr. *Stiles*, now Sir *Francis Eyles Stiles*, the lessee.

This is very easily resolved in point of law: to be sure it was not a substantial effectual lease, till sealed in 1740, for as to the sealing in 1739, the day before the plaintiff's election, it is admitted at the bar that was invalid, for want of a surrender of the old leases, or it would have been a lease for four lives, and within the disabling statutes; and no men in their senses would set their seals to leases giving a right to two different sets of persons for their lives, the same day: Therefore they could have no apprehension they had made an effectual lease, and binding upon the body corporate.

As

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As to the altering the date from the 26th of *June* to the 12th of *November*, it ſhews plainly Mr. *Sayer* himſelf did not apprehend the former were valid leaſes, ſo that they were ineffectual not only in point of law, but even in the apprehenſion of the parties till 1740, when Mr. *Stiles* the leſſee found out the management againſt himſelf, and inſiſted upon an effectual leaſe.

If it was not a ſubſtantial leaſe in point of law, conſider it next on the foot of equity.

It has been inſiſted, on the part of the defendants, that if there was ſuch an agreement in *May* and *June* 1739, as bound both parties in a court of equity, this court, though executory, will carry it into execution, and therefore is to be conſidered as final and complete from that time.

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The rule as to carrying agreements into execution as to private perſons, will not hold generally as to aggregate bodies.

There are many caſes with relation to private perſons, where agreements have been conſidered as binding, and the court will carry them into execution, but will not hold generally as to agreements made with aggregate bodies.

Then the queſtion will be, what has been done in the preſent caſes on the ſide of the plaintiff; it is called a depoſit only, and on the ſide of the defendants a payment, and that the body corporate is bound by it.

Bodies corporate, eſpecially eccleſiaſtical, differ extremely from private perſons.

Bodies corporate, eſpecially *eccleſiaſtical*, differ extremely from private perſons: I do not give any opinion on the caſe I am going to put; but ſuppoſe a body corporate, having a power, make an agreement for a renewal, and the fine is paid, I will not ſay the court will not compel them to execute a leaſe, notwithſtanding a new member is introduced amongſt them, becauſe, as they had a power over the legal eſtate, they had a power over the equitable; but then there will be a great difference where the agreement for the contract was not fixed and certain, but might be varied, for here was a queſtion between themſelves how the contract was to be made.

Suppoſe there is an enhancing of the fine on the delay of the tenants applying to renew, that will not alter the right of the new member as to his proportionable ſhare of the fine: I will go further ſtill, ſuppoſe the court ſhould conſider an agreement to do an act by a dean and chapter as done, where the dean and chapter have full power over the revenues, and the tenants full power to renew their eſtates held of them, yet it will prove nothing in the preſent caſe, for that will bring it to the queſtion, whether this was ſuch an agreement as they were bound by.

I am of opinion this was not a binding agreement, for it all depended upon the will of Mr. *Edwin* the mortgagee, who was no party to the agreement.

Suppoſe a dean and chapter are very reaſonable in the fine they demand, and any accident delays the leaſe, which has not at all happened from the fault of the dean and chapter, or even from the tenant, but from ſome particular circumſtances, yet if the leaſe is not completed till the new member comes in, he ſhall have his proportion.

A blank was left for the lives in the leaſes that were ſealed on the 26th of *June*, and the dean and chapter were not obliged

to

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to accept of the lives that should be named afterwards, and Mr. *Stiles* says, he understood it as a deposit only, because the dean and chapter might, if they pleased, disapprove of the lives.

Where a mortgagee of an old dean and chapter lease, refuses to surrender, a court of equity will not compel him, for he may insist the lives in being are better, or oblige the tenant, the mortgagor, to propose other lives, or redeem him; otherwise it had been a chattel interest, for there the granting a new and longer term [illegible] advantage to the mortgagee.

*Besides this, here was Mr. *Lawin* in the case, who had the legal interest, and a right to be consulted as to the surrender of the old lease; for I am of opinion, if he had refused to surrender, a court of equity would not have compelled him, as he was an incumbrancer, for he might have objected to the lives proposed, and insisted the lives in being were better, or obliged the tenant, the mortgagor, to have proposed other lives, or redeem him: Indeed, if it had been a chattel interest, and lease for [illegible] only, it would have been otherwise, for then, upon surrendering the old, in which there was only a remainder of a term to come, a new and longer term would have been granted, which was an advantage to the mortgagee, as being a better security.

Mr. *La[illegible]* did not surrender the lease, nor were any orders sent by Mr. *Stiles* for executing new lease till *November* 1739; the plaintiff [illegible] the 2[illegible] of *June* before, and therefore is intitled to a share of the fine.

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Accidents might have happened in the intermediate [illegible], of death in the corporate body, or of [illegible], upon [illegible] preferred, which might have made an [illegible], in that case it would have been [illegible], that [illegible] have insisted the agreement was binding, and ought to have been carried into execution.

By a letter of the 7th of *August*, 1739, from Sir *[illegible]*, Mr. *S[illegible]*'s [illegible], to the defendant Mr. *S[illegible]*, [illegible] to the [illegible] form of the [illegible] to him [illegible], the [illegible] was not [illegible], *[illegible]* for his son, and therefore this imports that the son understood the payment of the thousand guineas to be as a deposit only, and had no apprehension the dean and chapter intended to divide it till the whole contract was performed, another letter to *Stiles* of the 31st of *August* 1739, has been read, importing what defendant calls an agreement, was not binding, but requires a further agreement.

Then at what time was the consent of the lessee, that the dean and chapter should divide it amongst them? certainly not till *August* 1740, and seems to me so plain, that I am of opinion there was no agreement that could bind this body corporate or lessee, till after the surrender, and Mr. *Adam* the mortgagee's coming in.

Taking it then either in law or equity, it is a clear case, that the plaintiff is intitled to his share of the fine.

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If a body corporate make an agreement with a person to grant him a lease, and the money is paid, [illegible] some of the members of that body were wanting, a court of equity will carry it into execution.

Still it has been said, that these are *incerti proventus*, and a dean and chapter therefore are justified in getting them as soon as possible, and that the agreement with a lessee, and payment of a fine, binds the body corporate, and if a body corporate makes an agreement with a person to grant him a lease, and the money is

paid,

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paid, I will not say a court of equity would not carry it into execution; probably it would, though some of the members of that body were wanting.

But a dean and chapter ought to consider themselves as trustees for their successors, and not suffer any immediate advantage to themselves in filling up vacant lives, to bias their minds in taking a lesser fine to the prejudice of the succession.

A dean and chapter ought not to suffer any immediate advantage to themselves in filling up vacant lives, to bias their minds in taking a less fine, to the prejudice of the succession.

They have a trust reposed in them by the crown, or by their founder, for the benefit of the succession, as well as for themselves, and they ought to have the succession principally in view, and though where the matter is finished and complete, a court of equity cannot set it aside, yet they would not strain to support such a contract.

Where the matter is finished and complete, a court of equity cannot set it aside, but they would not strain to support such a contract.

Upon the whole, I am of opinion the plaintiff is intitled to a decree for his demand, and on the circumstances of the case, to his costs from all the defendants, and his Lordship decreed accordingly (1).

(1) *Reg. Lib. B.* 1746. fol. 235.

April 8, 1747. *Ex parte Strangeways.* Case 161.

A Bill was brought by Mr. *Strangeways* against his wife, she appeared in court and desired that a guardian might be assigned to put in an answer for her.

LORD CHANCELLOR.

I am of opinion, that the husband's bringing a bill against her is admitting her to be a feme sole, and she must put in an answer as such; and that he never knew an instance of appointing a guardian in this case (1).

A husband's bringing a bill against a wife, is admitting her to be a feme sole, and she must put in her answer as such.

(1) *Vide Ex parte* [illegible], *ante*, 2 vol. 50. *Mitf. Pleadings* 95.

April 8, 1747. *Ex parte Maire.* Case 162.

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A Petition was preferred, praying that an infant, the heir of a mortgagee in fee, who was likewise a feme covert, might convey by fine under the statute of 7 *Ann. c.* 19. the Master reporting it to be necessary.

The court under the stat. of 7 Ann. may order an infant, the heir of a mortgagee in fee, and who is likewise a feme covert, to levy a fine under the general words, that persons under age *shall convey and assure* (1).

Lord Chancellor said, this question came before him soon after he had the seals, and that he consulted with Lord Chief Baron

(1) So *Lombe* v. *Lombe*, *Barnes* 217. *Vide Ex parte Johnson*, *post*. 559.

Comyns,

Ex Parte Marr.

Comyns, who thought the court might order an infant that was a feme covert to levy a fine; for the act is general, that all persons under age shall convey and assure; and that as a *feme covert* of full age could not assure, but by fine, the court may direct an infant to convey in the same manner in the present case. *Vide Lord Chief Baron Comyns's Rep.* 615.

An affidavit of service on the husband is not sufficient, he must consent by counsel to the prayer of the petition.

In the present case there was only an affidavit of service on the husband, which his Lordship did not think sufficient, but directed it to stand over till the next day, that counsel might consent to the prayer of the petition for the husband; and the next day he made an order according to the prayer of the petition.

Case 163. *April* 10, 1747. *Ex parte Little.*

This court cannot do any thing after the return of the writ of *excommunicato capiendo* is out, for the King's Bench have the cognizance, for they can compel the sheriff to return it, and the application to quash it must be there.

A Petition to supersede the writ of *excommunicato capiendo* after the return day was out.

Mr. *Yorke* for the petitioner, cited 1 *P. Wms.* 435. *The King* versus *Burrard*, where the court inclined to think, that after the writ has been issued out of this court, and been brought into the court of King's Bench, and there delivered to the sheriff, but not yet actually returned into the King's Bench, this court, on a plain error appearing, may supersede or quash it (1).

Mr. *Wilbraham*, of the other side, cited *The King* versus *Fowler, Salk.* 293. where it was held by the court of King's Bench, that a person in custody, by a writ of *excommunicato capiendo*, cannot go into Chancery for a *supersedeas*, because the writ is returnable in the King's Bench, and they may quash the writ, or award a *supersedeas*, as they are judges of the cause, and have it before them.

He likewise cited *The Queen* versus *The Bishop of St. David's, Salk.* 293. where the same rule is down.

Lord Chancellor,

[480] After the return of the writ of *excommunicato capiendo* is out, this court cannot, on a petition to quash the writ, do any thing in it, as they have no authority, for the court of King's Bench have the cognizance of it, and they can compel the sheriff to return it, and you must apply there to quash it.

If the writ had issued in the vacation, and not yet returnable, this court would have given relief, and discharged the person out of custody.

If the writ had issued in the vacation, and had not been yet returnable (for it must be returned on one of the return days in the term) this court would have given relief, and discharged the person out of custody.

The petition was dismissed.

(1) *Vide Barlow* v. *Collins*, 1 *P. W.* 436. in note.

Knight versus *Lord Plimouth*. *April* 10, 1747. Case 164.

A Person who had been appointed *receiver* under an order of this court of Lord *Plimouth*'s estate, having received the sum of seven hundred pounds and upwards in rents, did not think it safe to remit the money to *London*, and therefore paid it to *Winsmore*, a considerable tradesman in *Worcester*, and took bills of exchange from him drawn on persons in *London*; Mr. *Winsmore* very soon after becomes a bankrupt, and there was an application to the court some time ago against the receiver, that he may make good to the estate the loss that has happened; Lord Chancellor referred it to a Master to inquire into the fact, and to state it with all the circumstances to the court.

A receiver appointed by this court shall not make good a loss which was not owing to any default of his (1), for where the rents he has in his hands are large, it is a necessary precaution to remit it by bills to *London* rather than in specie.

It came on to-day upon the Master's report, and upon the state of it, as certified by the Master, it appeared the receiver did it only for the greater safety, as it was a large sum of money to remit in specie, and that he had no notice of *Winsmore*'s being in declining circumstances, who, till a week before he broke, had as great credit as any person in *Worcester*.

Where a receiver pays money to a tradesman, and takes bills for the sum, if he was in credit at the time, though he fail soon after, it shall not affect the receiver.

Upon the circumstances of the case, his Lordship said, it would be very hard to oblige the *receiver* to make good a loss which was not owing to any default of his, but as the sum was large, it was a necessary precaution to remit it by bills, rather than in specie, and at the time the money was paid to *Winsmore*, he had no reason to doubt its being lodged in a safe hand, and therefore indemnified the receiver in the act he had done (2).

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But said, at the same time, he would not lay it down generally, that the court will indemnify a receiver appointed by them, if it should appear he had been guilty of any fraud or collusion in a transaction of this kind, and that the money was lost by his wilful default, and placing it in what he knew at the time to be an improper hand; for he should then be of opinion, the court, as he is an officer appointed by them, would oblige him to answer the loss out of his own pocket.

But if the money had been lost by his wilful default, and placing it in what he knew at the time to be an improper hand, the court will oblige a receiver to answer the loss out of his own pocket.

(1) *Beauchamp* v. *Silverlock*, 2 *Cha. Rep.* 9. *Horsley* v. *Chaloner*, 2 *Ves.* 85. *Ex parte Belchier*, *Amb.* 219. *Contra Rider* v. *Bickerston*, 5 *Bac. Ab.* 401. *pl.* 12.

(2) His Lordship ordered, that the said receiver should be allowed out of the ballance in his hands, the sum of 785 *l.* being money, which at present cannot be had out of the estate of the said Mr. *Winsmore*. *Reg. Lib.* A. 1746. fol. 365.

Case 165. *April* 11, 1747. *Ex parte Annesley.*

LORD CHANCELLOR,

THERE is no privilege of peerage in *Ireland* in the case of waste; *quære* as to *England*.

Case 166. *Blount* versus *Doughty, Teresa Maria Blount, and Martha Blount, and others, May* 4, 1747.

The court will not determine bonds to be voluntary, if they do not exactly tally with the sum given for them; but if the contract was fairly entered into without any circumstance of fraud, it has been held to be made for a valuable consideration.

LISTER Blount, the plaintiff's grandfather, by deed of the 15th of *May* 1710, reciting a settlement wherein was contained a power for him to charge the manors, &c. thereby settled, with any sum not exceeding two thousand pounds, demised to *Englefield* and *Libb* the manor of *Maple-Durham*, &c. to hold to them, their executors, &c. from the day of his death for *ninety-nine years*, on trust to raise two thousand pounds, and pay the same to the defendants *Teresa Maria Blount*, and *Martha Blount*, the plaintiff's aunts, as an addition to their fortune, in manner following, *videlicet*, In case one or both of them married, then to pay to one or both of them so marrying one thousand pounds a-piece, within six months after their marriage; and if both died before marriage, then to such person as at the death of the survivor should be intitled to the inheritance of the premisses.

Lister Blount by his will, dated the 15th of *May* 1710, "gave "the defendants *Teresa* and *Martha* 1500 *l.* a piece, to be "raised out of his personal estate, (except plate, pictures, "collection of horns and houshold goods), and to be paid to "them within *twelve months* after his decease, with interest at "five *per cent.* from his death, and after other legacies and debts "paid, gave the residue of his personal estate (except as afore-"said) to the defendants equally between them, *and likewise by* "*his will requested his son* Michael Blount, *then an infant about* "*the age of seventeen; that when he married he would give defend-*"*ants one thousand pounds a-piece, six months after they should be* "*married*, and likewise gave all the excepted plate, &c. to "*Michael Blount*, he paying for the same within twelve months "after his marriage, or age of twenty-one, one thousand pounds "to these defendants as an addition to their fortune, and made "*Henry Englefield* and *Martha Blount*, defendant's mother, exe-"cutors."

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Lister Blount died *June* 10, 1710, after whose death *Michael Blount*, the only son and heir of *Lister*, by a recovery, barred the entail in his father's marriage settlement, and thereby became intitled to an estate in fee in the premisses, subject to 2000 *l.* additional

additional portion secured by the deed of the 15th of *May* 1710 (1).

"By articles of agreement of the 10th of *June* 1714, between "*Teresa* and *Martha Blount* of the first part, *Michael Blount* of "the second, and the executors of *Lister Blount*'s will of the "third, reciting the will as above, and that *Michael* was wil- "ling to accept the plate, pictures, &c. at the value of one "thousand pounds, and that the whole amount of what the "defendants *Teresa* and *Martha* were to have towards their "maintenance whilst they continued single, would not be above "931 *l.* 8 *s.* 9 *d.* a-piece, which was conceived to be too little "to maintain them according to their birth, which being added "to the 1000 *l.* a-piece secured by their father's settlement, would "make their whole fortunes, in case they married, amount to but "1931 *l.* 8 *s.* 9 *d.* each; and further reciting that *Michael* hav- "ing attained his age of twenty-one, out of brotherly love and "affection, was resolved to augment their fortunes, it was wit- "nessed, that for settling all controversies between the parties, "and securing to the defendants a competent maintenance while "single, and portions in case of marriage; the defendants "covenanted with the executors of *Lister Blount*, that it "should be lawful for them to pay the money which re- "mained in their hands of *Lister*'s personal estate to *Mi-* "*chael*, and deliver to him the rest of the personal estate "undisposed of, and to make over all the right and in- "terest of the defendants in the same for his use and benefit; "and that the defendants would execute to the executors a "general release of all their demands by virtue of the will; and, "in consequence thereof, *Michael* covenanted with the defend- "ants *Teresa* and *Martha*, that he, his heirs, executors, or ad- "ministrators would, upon the defendants executing such re- "lease, give to these defendants two several bonds in the penalty "of 4000 *l.* for payment of 1025 *l.* to each of them, their "executors, &c. on the 25th of *March* next (*which was ac-* "*cordingly paid to the defendants*), and also fifty pounds a year to "each of them, clear of taxes, half-yearly, so long as they con- "tinued unmarried; and also to pay to the defendants respec-

(1) *Michael Blount*, by his marriage settlement in 1715, conveys part of these lands to the use of himself for life, remainder as to a rent-charge for his wife for life, remainder to his first and other sons, &c.; he also settles certain other premises for the term of 200 years, remainder to himself in fee. The trusts of the term were in the first place to permit *Michael* to receive the rents so long as the rent charge should be paid, and in default of payment thereof by reason of the charge of the said 2000 *l.* upon the settled estate, then for the purpose of raising so much money as should be necessary to pay what should be found due in respect of the said charge; *to the intent that the premisses charged with the said rent to his wife might be discharged of the said* 2000 *l.* *Michael Blount* covenants for himself, his *heirs, executors,* &c. that he would pay the said 2000*l.* when it should become payable; and by his will creates a term of 1000 years for payment of such of his debts, for which he had given no landed security.

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"tively the further sum of 1000 *l.* within six months after their "respective marriage, over and above the 1000 *l.* secured to "them by the deed of the 15th of *May* 1710."

Teresa *and* Martha *did afterwards give a release to the executors.*

[483] And *Michael* did, by two bonds dated the 7th of *May* 1716, bind himself, his heirs, &c. in the penalty of 2000 *l.* conditioned to pay to each of his sisters 50 *l.* a year without deduction whilst single, and to each of them, their executors, &c. 1000 *l.* six months after their respective marriages (1).

Michael was at his death indebted in above 4000 *l.* by bond and otherwise.

The bill was brought by the son of *Michael*, that the 2000 *l.* provided for *Teresa* and *Martha Blount* may be raised out of the personal and real assets of *Michael*, and paid pursuant to the trusts of the deed of the 15th of *May*, 1710, and that the remainder of the ninety-nine years term in the trust estate might be assigned to attend the inheritance.

At the hearing of the cause it was decreed, that it be referred to a Master to take an account of the personal estate of *Michael*, and to summon his creditors, and to state the several incumbrances and debts, and reserved the consideration as to the satisfaction of the several debts and incumbrances, till after the report.

It came on now upon the Master's report, by which it appears that there were a great number of bond creditors of *Michael Blount*, subsequent in time to the bonds given by him to *Teresa* and *Martha Blount*.

The principal question was, Whether the bonds to *Teresa* and *Martha* are voluntary, and to be postponed to just debts.

Mr. Solicitor general for the defendant cited *Bell* versus *Scott*, 2 *Lev.* 70 and *Newstead* versus *Searle*, *February* 20, 1737, before Lord *Hardwicke* (2), and the case of *Doctor Young* and *the trustees of the late Duke of Wharton and some of his bond creditors*, also before Lord *Hardwicke* (3).

LORD CHANCELLOR,

The question is, Whether the two bonds of the 7th of *May* 1716, from *Michael Blount*, were voluntary, or for a valuable consideration.

If to be considered as merely voluntary bonds, then they are within the case of *Jones* versus *Powell*, before Lord *Harcourt*, *Eq. Cas. Abr.* 84. and ought to be postoned to all debts (4).

If for a valuable consideration, then they must be allowed to come in with the bond creditors of *Michael*.

I am of opinion they are not mere voluntary bonds.

(1) These bonds were given to secure the sums of 1000 *l*, and 1000 *l.* pursuant to the articles of *June* 1714. over and above the sum of 2000 *l.* secured by the deed of the 15th *May*, 1715.

(2) *Ante* 1 vol. 265. S. C.

(3) *Ante* 2 vol. 152. S. C.

(4) *Ramsden* v. *Jackson*, *ante* 1 vol. 294.

It

It would be extremely dangerous for the court to determine them to be voluntary; if they are not adequate, or tally exactly with the sum given for them, the court has not measured the consideration of debts of this kind by exact rules of proportion of value, nor does it require that the consideration should be commensurate to the value of the estate; but if such a contract was fairely entered into without any circumstance of fraud, then it has been held as made for a valuable consideration: I was of that opinion in *Newstead* versus *Searle*, and in Doctor *Young*'s case.

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Here was a request likewise by the father of *Michael* to make good the father's will, and if a bare request only, would have been a strong circumstance in favour of the defendants; but where a father makes a will, and is considering the particulars and situation of the estate, and gives a legacy to the son and desires he will do an act for the benefit of his sisters, this to be sure does amount to an obligation upon the son as far as the value of the father's estate extends; and in many cases a *request* has been construed to amount to an absolute devise (1).

Where a father makes a will, and, in considering the particulars of his estate, gives a legacy to his son desiring he will do an act for his sister's benefit, this amounts to an obligation upon the son, as far as the value of the father's estate extends.

If the son taking a benefit from the father's will, promises to make it good, this may be a valuable consideration for a bond or settlement, and would not be fraudulent; and this was a very strong ingredient in the case of Mr. *Thynn* of *Egham*, where the court decreed against the son, as he had declared that he would be only an executor in trust for her under the father's will. *Eq. Cas. Abr.* 38c. 1 *Vern.* 296.

Where a son taking beneficially by a father's will, promises to make it good, this may be a valuable consideration for bond, and would not be fraudulent.

It has been objected here, that the son was under age at the time of the will, and at the death of the testator.

But if, after coming of age, he thought fit to renew that promise, the promise under age may be a consideration for a promise when of age, and has been so held at common law (2).

A promise under age, may be a consideration for a promise when of age.

But I go further, and, even abstracted from this, think it a good consideration: The sister took a bond instead of ready money, for they were intitled to have received above 450*l.* a-piece, and might then have improved that sum, in the funds, and in this length of time made it considerable.

No body can tell likewise how far the undertaking of the brother to perform the promise might create a facility in the sisters in taking the account of *Lister Blount*'s estate.

They were also intitled on the delivery of a specifick legacy to *Michael*, to a farther sum, valued by the testator at a thousand pounds.

They likewise consented the residue should be paid over to *Michael*, and take his bond, his personal security for payment of the money. [485]

(1) *Vide* the note to *Harding* v. *Glyn*, *ante* 1 vol. 470.

(2) *Vide Brooke* v. *Galley*, *ante* 2 vol. 34. *Smith* v. *French*, ibid. 245.

This

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This was a consideration, and a very material one; it was a great prejudice to them to lose the immediate payment of the money, and as great an advantage to *Michael* to have it in his hands; a release besides was given by the defendants to the executors of *Lister Blount*.

All these things complicated together make a good consideration, for it is an intire contract, and must be taken together; and I cannot divide it, for no body can say the sisters would have permitted the brother to retain this thousand pound, unless he had agreed to perform the promise.

Where the court sees a consideration is made up with a view to defraud creditors, they will reduce it to what is just and equitable.

The determination I shall make will not be liable to the inconvenience suggested by the counsel for the creditors; for whenever the court shall see a consideration is made up, with a view to defraud creditors, the court will lean against it, and reduce it to what is just and equitable; But there is no such ingredient in the present case.

2 *Lev.* 70. is a very strong case; there a *feme covert* joins in an alienation of her jointure, and had another made the same day without precedent articles or agreement; and it was held by *Hale*, and the whole court, not to be fraudulent against purchasers.

To be sure, where there is any symptom of fraud, and done with an intention to cover something against creditors, the court will not suffer it to prevail; but as this transaction is clear of any such imputation, I am of opinion the two ladies Mrs. *Teresa* and Mrs. *Martha Blount* are to be considered as bond creditors for a valuable consideration, for the whole sum (1).

(1) His lordship declared, that the plaintiff is not entitled to any specific lien on the trust of the said term of 200 years created by the said marriage settlement, to exonerate the said *settled estate* from its proportion of the charge of the said 2000 *l.* created by the said *Lister Blount*; but he is entititled to come in as a creditor, by virtue of the *covenant* contained in the said settlement upon the said trust estate to receive a satisfaction for so much of the said 2000 *l.* and interest as should be *found to be the* proportion to be borne by the settled estate: and his lordship declared that the said bonds of the 7th of *May* 1716, are not to be considered as *voluntary* bonds, but as bonds for a *valuable consideration*. *Reg. Lib.* A. 1746, fol. 614.

Case 167. *Easter term, May* 6, 1747.

LORD CHANCELLOR,

If a defendant by his answer admits he has done waste before the filing of a bill, though he swears he has committed none since, yet that is not sufficient to induce the court to dissolve the injunction.

IT is not a sufficient inducement to the court, to dissolve an injunction for staying waste, that the defendant in his answer swears, he has not committed any waste since the filing of the bill, for as he admits that he has done waste before, the court will presume he may do further waste: the injunction therefore must be continued (1).

(1) *Vide Gibson* v. *Smith ante* 2 vol. 182. *Robinson* v. *Litton*, *ante* 209. note.

Where

Where a cause is abated by the death of a defendant, the plaintiff is not obliged to bring a bill of revivor, but may file a new bill, because the plaintiff may think perhaps, that he can make a better case than by the first bill.* *Vide* 1 *Vern.* 463 (1). where this rule is laid down.

A plaintiff on the death of a defendant, is not obliged to bring a bill of revivor, but may file a new bill.

(1) *Spencer* v. *Wray*. S. C.

Ridout versus *Pain*, *May* 9, 1747. Case 168.

" RIchard Pain, the plaintiff *Elizabeth*'s first husband, made " his will on the fourth day of *August* 1733, and after " therein reciting, that he had already settled the moiety of his " farm, and lands in *Ovingdeane*, in jointure on (*the complainant*) " his then wife, and that in case he should die *he thought that not* " *sufficient for her to live hospitably upon*, did by his will give to " the plaintiff *Elizabeth* one moiety of the other half part, not " settled on jointure to her, for life, and also gave to her all " his mansion-house with the out-houses, &c. wherein he then " dwelt in *Lewes*, and also a small parcel of *Brookland* in *Lewes*,

S. C. 1 Ves. 10. *R. P.* in the devise at the end of his will, says, " All the rest, residue and remainder of my goods, chattels and personal estate, *together with my real estate*, not herein before devised, I give to my wife, whom I appoint sole executrix." The words, *together with my real estate* (1), *will carry the land and inheritance, notwithstanding they are accompanied with the words, goods, chattels, and personal estate.*

(1) The word *estate* in a will, generally speaking, not only passes the lands, but the testator's *interest* in those lands. Thus a devise of an estate in or at *B*, or a general devise of all the testator's real estate, will carry the *fee-simple*; if he has so great an interest therein. *Cole* v. *Rawlinson*, 1 *Salk.* 234. *Bridgwater* v. *Bolton*, *ibid.* 236. *Murry* v. *Wise*, 2 *Vern.* 564. *Prec. Cha.* 264. *Barry* v. *Edgworth*, 2 P. W. 523. *Tanner* v. *Morse*, *Ca. temp. Talb.* 284. *Tuffnal* v. *Page*, *ante* 2 vol. 38. *Ridout* v. *Pain*, *supra*. *Goodwin* v. *Goodwin*, 1 *Ves.* 228. *Bailis* v. *Gale*, 2 *Ves.* 48. *Macaree* v. *Tail*, *Amb.* 181. *Holdfast* v. *Marten*, 1 *Term Rep.* 411. Tho' the introductory words of a will, " as to all my " wordly estate," &c, is a strong circumstance connected with other words to explain a testator's intention of enlarging a *particular* estate, or passing the fee, in cases where he has not used words of *limitation* or the word estate as applied *directly* to that particular devise, yet such introductory words will not *alone* be sufficient. *Denn* v. *Gaskin*, *Cowp.* 657. 660. *Loveacres* v. *Blight*, *ibid.* 356. *Right* v. *Russell*, *Dougl.* 732. *cited Roe* v. *Boulton*, *ibid.* cited *Right* v. *Sidebotham*, *ibid.* 730. *Frogmorton* v. *Wright*, 3 *Wils.* 414. *Goodright* v. *Stocker*, 5 *Term Rep.* 13. But where the introductory words are evidently connected with the subsequent devise, or where circumstances shew the testator's intention, that the word estate in the introduction of the will should apply to the subsequent particular or general devise, there the introductory clause shall enlarge the particular estate. *Ibbetson* v. *Beckwith Ca. Temp. Talb* 157. *Hogan* v. *Jackson*, *Cowp.* 299. *Loveacres* v. *Blight*, *ibid.* 352. *Hope* v. *Brown*, 1 *Burr.* 268. *Grayson* v. *Atkinson*, 1 *Wils.* 333. *Frogmorton* v. *Holliday*, 3 *Burr.* 1618. So tho' the word *estate* includes both *real* and *personal* property (*Beachcroft* v. *Beachcroft*, 2 *Vern.* 690. *Grayson* v. *Atkinson*, 1 *Wils.* 333. *Roe.* v. *Hervey*, 5 *Burr.* 2638. *Fletcher* v. *Smiton*, 2 *Term Rep.* 656. *Tilley* v. *Simpson*, 659. in note. *Roe* v. *Airs*, 4 *Term Rep.* 605.) yet if that word is joined to or connected with other words, which shew the testator's intention, that he meant it merely applicable to *personal* property, then the court, notwithstanding the introductory words, will decree an intestacy in favour of the heirs at law. *Wilkinson* v. *Merryland*, *Cro. Car.* 447, 449. *Timewell* v. *Perkins*, *ante* 2 vol. 102. *Grayson* v. *Atkinson*, 1 *Wils.* 334. *Bailis* v. *Gale*, 2 *Ves.* 51.

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"for her life, and did by his will give to his sister *Mary Pain* "(now *Mary Jones*) the other moiety of the unsettled moiety "of *Ovingdeane*, and after the death of the survivor of *Elizabeth* and *Mary* to trustees, to the use of his brother *Robert* "*Pain* for life, with remainder to the heir male of the body of "*Robert*, remainder to *Thomas Pain*, remainder to the heirs "male of his body, remainder to the testator's own right heirs: "he likewise gave the manor of *Gravely* farm, and *Wildgoose* "land, parcel of the same, to *Robert* and his heirs, charged "with legacies; he further gave to *Robert Pain*, the reputed "manor of *Redhall*, *Redhall* farm, and *new farm*, parcel of *Redhall*, and the heirs male of his body, and a farm called *Burstall* in *Surrey* to his sister *Mary* and her heirs, and two farms "in *Hanney* and *Laughton* in *Sussex*, to his brother *Thomas* "*Pain* and his heirs male; and for want of heirs male of either "*Robert* or *Thomas*, then he gives the last mentioned premisses "in trust for his own right heirs, *and all the rest, residue and remainder of his goods, chattels, and personal estate, together with* "*his real estate, not herein before devised, he gives to the plaintiff* "*Elizabeth, whom he appointed sole executrix.*"

The testator died on the 17th of *January* 1733, without making any other devise or disposition of his real estate, and at the time of his death was seised of the advowson of *Ovingdean*, and the fourth part of a wharf called *Subs-Key* in *London*, which estates are not mentioned in the will, nor devised specifically to any person.

The testator not leaving personal assets behind him sufficient for payment of his debts, and several disputes arising between the plaintiff *Elizabeth*, and *Robert*, *Thomas*, and *Mary Pain*,
[487] touching the will and the real and personal estate of the testator, the plaintiff *Elizabeth* and the defendants agreed to refer all matters in difference to the determination of Mr. *Newdigate* and Mr *Staples*, and the plaintiff and the defendants did, by several bonds dated the 6th of *June* 1735, bind themselves in the sum of one thousand pounds each, to abide the award of Mr. *Newdigate* and Mr. *Staples*.

In pursuance of the submission, the arbitrators made their award on the 17th of *October* 1735, and reciting that the personal estate of the testator fell short five hundred and ten pounds six shillings and sixpence to pay his debts, awarded the deficient sum to be paid by the plaintiff and the defendants in proportion to the value of their several freehold estates, which came respectively to them on the testator's death, either by descent or devise; *and did further award with the like consent of all parties, that one or more fine or fines, recovery or recoveries, should be levied and suffered of the whole estate of Richard Pain the testator, as soon as conveniently might be*; and that all or any of the parties should join in the same, as counsel should direct, *and that a deed to lead the uses thereof* should be executed by such parties, to confirm the said estates in the same manner as the same were given by the will of *Richard Pain*, at the proportionable expence of the parties.

By

By leafe and releafe of the 19th and 20th of *May* 1737, reciting the will, the differences between the parties, the arbitration bonds and the award, it is by the faid indenture witneffed, that for the better performing the award, and effecting the purpofes fubmitted thereto by the faid parties, and in confideration of five fhillings a-piece paid by *Nathaniel Trayton* to the plaintiff *Elizabeth*, and *Robert*, *Thomas*, and *Mary Pain*, they did grant and releafe to *Trayton* and his heirs, all the eftates before mentioned, of which *Richard Pain*, Efq; died feifed, or poffeffed of, to hold to the faid *Trayton* and his heirs, to the intent that he might become tenant of the freehold of the premiffes, fo that three or more recoveries might be had againft him, for barring all eftates tail and remainders in the faid premiffes, *that the fame* might be conveyed according to the intent and will of the teftator, and declared the ufes thereof as follows *videlicet*, *as to the manor of Ovingdean, advowfon of the fame parifh church of Ovingdean, and as to the dwelling-houfe wherein the plaintiff Elizabeth then lived, and the parcel of Brookland, and the undevidid fourth of Sabs-Key, to the ufe of Elizabeth for her life*, and after her deceafe to a truftee, in truft for *Robert Pain* during his life, with limitations to his iffue male, and feveral remainders over, remainder to the teftator's right heirs.

The plaintiff executed thefe deeds, upon an apprehenfion that the ufes therein were agreeable to the will, being fo informed by *Robert*, *Thomas*, and *Mary Pain*, and their attornies, and in purfuance of thefe deeds in *Michaelmas* term 11 *Geo.* 2. recoveries were fuffered of the faid premiffes; on the 29th of *May*, 1739, the plaintiff intermarried with Mr. *Ridout*, and they infift that *Elizabeth* is well intitled to the fee-fimple of the manor of *Ovingdean*, and alfo to the rectory of the parifh of *Ovingdean*, which are not mentioned in the will, and alfo of the dwelling-houfe in *Lewes*, and to *Brookland*, and to the undivided fourth of *Sab's Key*, and have brought their bill to have the benefit of the will and award, and that the eftates claimed by them may be conveyed to them and the heirs of *Elizabeth* for ever. [488]

The defendants infift, that the ufes in the releafe declared are agreeable to the exprefs words of the will, and that the plaintiff by the will of her late hufband is intitled to a moiety of the other half part of *Ovingdean*, not fettled in jointure, to the manfion-houfe in *Lewes*, and to the *Brookland*, *for her life only*, by the exprefs words of the will; and as to all the refidue of his real eftate, not particularly mentioned therein, they apprehend that he only intended her an eftate for life, *becaufe he declared the reafon of his making fuch farther provifion for her was that he thought fuch jointure not fufficient for her to live hofpitably upon*, and that was his only intention of devifing her any part of his real eftate.

Mr. Attorney General for the plaintiff infifted, the refiduary words pafs the eftates in reverfion as well as poffeffion, and that the whole intereft of the teftator in his feveral eftates not before difpofed of pafs to the wife.

Suppofe a man gives an eftate to *A.* for life, and afterwards fays, I give all my real eftate to *A.* that this would pafs the reverfion,

version, because at the time of the devise for life the testator had the reversion in him, and therefore something still remaining must pass by the latter words, *all my real estate*, which was the reversion.

He cited the case of *Sir Letton Stroude* versus *Russel*, 2 *Vern.* 621. to shew that the words, *lands, tenements and hereditaments*, have been held sufficient to pass the fee in a devise; and to the same purpose *Beachcroft* versus *Beachcroft*, 2 *Vern.* 690. and *Cook* versus *Gerrard*, 1 *Lev.* 212.

Mr. *Brown* of the same side cited no cases upon the general doctrine, because so well established, but only those that bear a resemblance to the particular wording of the will, *viz. Hopewell* versus *Ackland*, in *Salk.* 239. and in Lord Ch. B. *Comyns* 164. and *Scott* versus *Alberry*, Lord Ch. B. *Comyns* 337. and *Hyley* versus *Hyley*, 3 *Mod.* 228.

[489] Mr. Solicitor General for the defendants said, whether *Elizabeth* is intitled to an estate for life only, depends on two questions:

First, on the general construction of the will, and whether the words, *together with my real estate*, are to be construed to extend to the whole species of real property he had, or to that he had not before mentioned in his will.

There is a difference between a general substitution of real and personal estate; for if a man gives a personal thing to *A.* he gives it him for ever, without any necessity for a limitation, or qualification of what estate: but in *real*, the word *estate* either signifies the interest a man has in the estate, or only the thing, *the land*, and insisted that in the present case it means only the thing, and the testator did not intend to give his interest in it likewise.

He cited *Wright* versus *Horne* in the Common Pleas in the time of Lord Chief Justice *Eyres*, *Hil.* 1724. 1 *Mod. Cas. in Law and Eq.* 221. where it was held, the residuary words did not pass the estate, but it descended to the heir; he cited likewise *Markeaul* and *Twisdin*, *Eq. Cas. Abr.* 211.

He argued, that the testator would not have given the plaintiff an express estate for life, for an increase of maintenance if he intended to have added the fee afterwards.

In *Hopewell* versus *Ackland*, and *Scott* versus *Alberry*, the court, he said, went upon the intention, and not upon the word *estate*, nor in either of them is there any limitation of what estate, so that probably the persons who determined them, thought real estate would pass as well as personal, without limiting for what estate: in the present case are only the words *real estate*, but not the words, as in those cases, of *whatsoever* and *wheresoever*.

The second question is, If the plaintiffs are intitled to any relief after the award: the testator died in 1733, the differences were referred to arbitrators in *June*, 1735, all the parties were apprised of the will, and of the doubt in the will, and agreed that the arbitrators should determine this dispute among the rest, and they have awarded it to be only an estate for life in

the

the wife; and if persons do not chuse to go into a court of justice, but to refer it to private persons, they are equally bound by their decisions, as if determined in law or equity.

The person who drew the deed to lead the uses was *Elizabeth's* counsel, so that there is no pretence of fraud and imposition; and therefore the court will not set the whole at sea again, upon no other suggestion, but the mistake of the arbitrators as to the construction in the law of the will.

He cited for this purpose the case of *Anglesea* versus *Alglesea* in *Ireland*, and which by appeal came before the House of Lords here upon this point, Whether, as Lord *Anglesea* had submitted to arbitration merely on a misapprehension, as imagining *Charles Annesley* had no interest under several wills and codicils, should be bound by the submission; and the House of Lords determined the agreement to be binding on *Lord Anglesea*. [490]

Mr. Attorney General in reply said: The devise to *Elizabeth* in the first part of the will was intended for a maintenance, and the latter as a gift; and why is she not intitled to a bounty from the testator, as well as any other devisee.

The counsel for the defendants argue, that where a testator has given an express estate for life, it shall not be construed the testator meant by other words to give a greater estate; but this argument must be confined to those cases where it has been determined that an express devise for life shall not, by implication be enlarged into a greater estate; but this does not prevent a testator, notwithstanding he has in the former part of a will given only an estate for life, from giving afterwards a larger estate by express words.

As to Mr. Solicitor General's second point, that the parties are bound by the award, it would be destroying one principal rule in equity, that the court ought to relieve against mistakes.

To day the cause was in the paper as standing for judment.

LORD CHANCELLOR,

I did not direct it to stand over from any doubt in my mind, as to the points made in the cause, but that I might have time only to settle what the decree should be.

He then stated the will, and the several devises and limitations of the testator's real estates, and said, I mention these particularly, because I think the distribution of the several parts of the estate are material upon the construction of this will

The testator died soon after the making of it, and controversies arising between the plaintiff *Elizabeth*, the widow of the testator, and his heir at law, and the rest of the defendants, they agreed to refer all matters in difference to arbitrators, *who awarded that recoveries should be suffered of the whole estate of Richard Pain, and a deed to lead the uses thereof should be executed by all the parties, to confirm the estates in the same manner as they were given by the will.*

There is nothing particular that binds down the parties in the award, because the uses it directs are relative to the will. [491]

The parties signed their consent to this award.

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And by deed to lead the uſes, bearing date the 20th of *May*, 1737, the plaintiff *Elizabeth* and the defendants releaſe to *Nathaniel Trayton* all the eſtates comprifed in the will, to make him tenant to the *præcipe*, for ſuffering recoveries to bar the eſtate-tail in the premiſſes, *that the ſame might be conveyed and aſſured according to the intent of the will of the teſtator.*

It is to be relieved againſt this ſettlement that the bill is brought, and the particular complaint is, that there are four parcels limited (by the deed to lead the uſes) to *Elizabeth for her life only*, contrary to the will of the teſtator, and intention of the parties; the firſt two parcels are not mentioned in the will, *Sob's-Key*, and the *advowſon of Ovingdean*; the ſecond two parcels are deviſed to *Elizabeth* under the will, *videlicet*, the houſe in *Lewes* and *Brookland*, in all which *ſhe claims the fee-ſimple.*

The queſtion is, Whether ſhe is intitled to the inheritance.

This depends in the firſt place on what is the true conſtruction of the will, and what eſtate ſhe took under it.

And in the ſecond place, if the conſtruction be with her, then whether *the agreement, and the award, and the ſubſequent deed*, have altered the caſe, and created a bar to the equity that is ſet up by the bill.

The firſt queſtion divides itſelf into two ſubordinate queſtions; 1ſt, As to the parcels not taken notice of by the will; and 2dly, As to thoſe who deviſed by the will, whether the inheritance of *theſe four parcels* paſſed by the words in the reſiduary clauſe.

As to the firſt, it is very plain that the inheritance paſſed, and will not admit of a doubt.

Lord *Hardwicke* then read the words of the reſiduary clauſe.

There can be no queſtion but the words, *together with the real eſtate*, will carry the land and inheritance, notwithſtanding they are accompanied with the other words goods, chattels, *&c.* for though there are caſes where it has been doubted, whether the word eſtate joined to goods, *&c.* will carry the real eſtate, yet when a teſtator ſays, *together with my real eſtate*, it puts it out of all doubt.

[492] The caſe of *Markant* verſus *Twiſden*, cited by Mr. Solicitor General, was very different from this, for there the words were *chattels real and perſonal.*

Chattels real, are not called ſo, as being real eſtate, but becauſe they are extractions out of the real.

What are chattels real? *Leaſeholds and terms for years!* not called ſo, as being real eſtate, but becauſe they are *extractions* out of the real, as Lord Chief Juſtice *Holt* called them.

The reſiduary clauſe in this will carries the intereſt as well as the thing itſelf.

Then, if the reſiduary clauſe includes *the real eſtate*, does it contain the intereſt as well as the thing? There is no doubt but it does, eſpecially ſince the caſe of the *Counteſs of Bridgewater* and *The Duke of Bolton*, in 7 *Mod.* 106. which is a book of no authority, but the caſe is well reported. Lord Chief Juſtice *Holt*, in delivering the opinion of the court, ſays, that by conſequence of law it carries the fee, for the word eſtate implies a fee-ſimple, for that is the general eſtate which every man is ſuppoſed to be ſeiſed of, and comes from *ſtando*, becauſe it is fixed and permanent, and imports the abſoluteſt property that a man can

can have; he argued too, it imports a fee from the manner of pleading a *que estate*, as in a *formedon* the tenant pleads *J. S.* was infeoffed with warranty *cujus statum* the tenant has, and that shall be understood of a *fee*. This case has never been doubted since. (*Vide a report intitled Holt's Cases from* 1688 *to* 1710, *p.* 281.)

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The consequence of this is, that as to the two parcels not mentioned in the will, there can be no doubt but they passed by the residuary clause to the plaintiff *Elizabeth*.

The next question is, as to the other two parcels devised by name to *Elizabeth* for life, whether the reversion in fee of these estates, is included in the residuary clause?

I think it has been clearly settled since the case of *Wheeler* versus *Walroon*, in *Allen* 28. that the reversion will pass by the word *rest* of my lands, and followed by all that suit of cases of *Willows* versus *Lidcot*, 2 *Ventr.* 285, 286. *Litton* versus *Faulkland*, &c. 2 *Vern.* 621. and in several others in 3 *Mod.* and *Carthew*.

Settled since the case of *Wheeler* vers. *Walroon* in *Allen* 28. that the reversion will pass, by the word *rest* of my lands, in a devise.

Then the question is, Whether there is any thing particular to take this case out of the general rule.

One objection has been raised from the recital in the will, which is as follows, "That he had already settled the moiety, of "his farm and lands in *Ovingdean* in jointure on his then wife, "and that, in case he should die, he thought that not sufficient "for her to live hospitably upon, and therefore did by his will "give to *Elizabeth* one moiety of the other half part, not settled "on jointure to her *for life*, &c."

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From whence it was argued, that by this will he intended to give *Elizabeth* but an estate for life to increase her maintenance.

It is most manifest the testator did not intend to confine his bounty in all his estate to his wife for life, for he has not barely given her the usufructary interest in goods and chattels, but the whole property, and therefore as clear, that the inheritance passed in those parts of the real estate, of which the will takes no notice, and it is inferring a great deal too much to say that he intended to give her nothing but for life, and does not furnish any argument to overturn the general rule.

Another objection has been started, that the residuary devise is to the same person who is before made tenant for life, and therefore inconsistent to give her the same thing in fee, which he had given her for life only, in the former part of the will.

This objection deserves to be considered, but I think is not sufficient; it is a great deal too much, to say, that when a man makes a will, and gives a person a particular limited estate in one part of that will, and afterwards devises to the same person in more general words, that the devisee shall not take benefit by such general residuary devise; here are no restrictive words, if there were, would have made a material alteration in the case.

The law presumes that a testator even in making his will may vary his intention; as suppose a man gives a farm in *Dale* to *A. and his heirs* in one part of the will, and in another to *B. and*

Where a man gives a farm in *Dale* to *A.* and his heirs in one part of his will, and in another to *B.* and his heirs, it is now construed either a a joint-tenancy or tenancy in common, according to the limitation.

 his

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his heirs, it has been held by the old books to be a revocation; but latterly construed either a jointenancy or tenancy in common, according to the limitation (1).

As to the cases upon this head, the only one that carries an opinion in point is *Ayley* versus *Hyley*, in 3 *Mod.* 228. and *Comberb.* 93. where it was adjudged, that if it had not been for an exception in the will, the words rest and remaining part of his estate would have passed the reversion in fee.

I do allow that is only a judicial opinion, and not a judgment in point; but then consider that the cases of *Hopwell* versus *Ackland*, and *Scott* versus *Alberry*, determined since, agree with this; in the latter the testator says, as touching the worldly estate it hath pleased God to bestow upon me, I give the same in manner following; *Item*, I give to *T. S.* all that my parcel of land lying in *Waltham Abbey* (being the lands in question); *Item*,

[494] I give to the said *J. S.* my wearing apparel, linen, books, *with all other my estate whatsoever and wheresoever not herein before given and bequeathed.*

When a testator gives all his estate whatsoever and wheresoever, it comprehends all that he had, real or personal.

It is true the words for life are not in it, and it may be said the latter words are explanatory of the intention in the former, but the court did not put it at all upon this; but held that from the force of the words themselves, that when testator gave all *his estate whatsoever*, it comprehended all that he had, real or personal estate.

It is very plain therefore, that the reversion in these two parcels likewise passes to the plaintiff *Elizabeth* by the residuary words, and whatever may be the general argument, a particular one arises here from the will itself in favour of this construction; for as to part of what he gives to *Elizabeth* for life, he disposes of the inheritance to his brother, and his issue, remainder to his own heirs, and then gives *the rest, residue, &c.* to *Elizabeth*; this is shewing how much he meant should go in reversion to his heirs, and might very naturally give the inheritance in the residue to *Elizabeth*, after he had taken out by way of exception what he intended to give to other persons.

This being the true construction of the will, then the next question is, whether the award and the agreement of the parties signing the award, and the subsequent reccovery and declaration of the uses, will be a bar to the plaintiffs.

It has been objected by the defendant's counsel, that the award will stand in the plaintiff's way, and that whether rightfully or wrongfully determined, as the arbitrators are judges of their own chusing, the parties are bound by it, especially as no circumstances of fraud are pretended, and there would be no end of controversies, if parties were allowed to come into this court afterwards.

I agree this to be the general rule, not to open such agreements; and the case of *Can* versus *Can*, determined by Lord *Macclesfield*, is very strong to this purpose, 1 *P. Wms.* 723.

(1) *Vide Ulrich* v. *Litchfield*, *ante* 2 vol. 373. note 1.

But

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But these authorities are not at all similar to the present case, for supposing this had depended on the award, and that had directed different uses than are in the will, if the arbitrators are mistaken in a plain point of law, it is a ground to set it aside (1).

If arbitrators are mistaken in a plain point of law, it is a good ground to set aside an award, otherwise if it had been a doubtful one.

The case of *Comforth* versus *Green*, in 2 *Vern.* 705. will determine this point, where Lord *Cowper* lays it down, that if arbitrators go upon a plain mistake either as to law or fact, equity will relieve against the award; and in the case of *Medcalf* versus *Ives*, the 18th of *June* 1737, I was of the same opinion. *Vide* 1 *T. Atk.* 63.

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If indeed it had been a doubtful point of law, the arbitrator's award might have stood, notwithstanding the court upon great deliberation should be of a different opinion.

But I am delivered from this, because the award does not specify any particular uses, but directs, "That a deed to lead the "uses of the fines and recoveries should be executed by all the "parties, to confirm the estates in the same manner as the same "were given by the will of *Richard Pain*." There is indeed a recital in the award which affords a conjecture, but I am not to determine by arbitrary implications.

Then the only question is, Whether I am to relieve against the deed of the 20th of *May*, 1737; if this varies from the uses of the will, and the plain legal construction, it differs equally from the award, and therefore there is no occasion to enter into the debate how far the court have power over awards, or will confirm or set aside the agreement; and that brings it to what is the true construction of the will, which I have mentioned before.

"I therefore declare, that the plaintiffs in the original cause "are intitled to have the uses of the deed of the 20th of *May*, "1737, so far as they relate to the particular parts of the real "estate of the testator herein after mentioned, rectified and "varied, according to the true construction of his will; and do "order and decree that the testator's house, and the piece of "*Brookland* in *Lewes*, and also the advowson of the parish "church in *Ovingdean*, and the fourth part of the estate called "*Sab's-Key* in *London*, with their respective appurtenances, be "conveyed *to the plaintiff Elizabeth*, the wife of the plaintiff "*Richard Ridout, and her heirs*, and the plaintiff Mr. *Ridout*, "present in court, consenting to pay the testator's debts that re- "main unsatisfied, and likewise to reimburse the defendants any "of the testator's debts they may have paid off; I do further "order that he do pay off so much of the testator's debts as re- "main unsatisfied, and any of the defendants who have paid "any of the testator's debts, are to stand in the place of the "creditors, to receive a satisfaction from the plaintiff Mr. "*Ridout* for what they have so paid." (2).

(1) See *Medcalf* v. *Ives*, *ante*, 1 vol. 64. (2) *Reg. Lib.* B. 1746. fol. 508.

Case 169. *Sir James Lowther* versus *Stamper*, *May* 8, 1747.

The court will not grant an injunction to stay waste in digging mines till the answer is come in, or the defendant has made default in not putting in his answer.

MR. *Barlow*, before the answer was come in, moved for an injunction to stay waste in digging mines of coal, upon an affidavit of the title, waste committed, and a certificate of the bill filed.

Lord *Hardwicke* denied the motion (1), because it appeared that the defendant set up a right to the inheritance of the estate in which the mines were dug, and said that such injunctions were never granted before the hearing, unless the defendant had only a term in the estate, for years, or for life, and the reversion was in the plaintiff.

Mr. *Barlow* compared it to the case of bills brought by the proprietors of new inventions under letters patent for an injunction to stay other persons from doing any thing of the same kind; there, on filing of the bill, the court on affidavit and certificate will grant an injunction (2).

His Lordship said, this was quite a different case from the present bill, because the right of the plaintiff there to the sole property appeared upon record, but here the rule of the court is not to grant an injunction till either the coming in of the answer, or the defendant's making default in not putting in his answer.

(1) *Vide Whitelegg* v. *Whitelegg*, 1 *Bro. Cha. Rep.* 57.

(2) *Vide Whitchurch* v. *Hide*, *ante* 2 vol. 391.

Case 170. *Carte*, *Administrator of the late Vicar of Hinckley*, versus *Ball and others* *May* 13, 1747.

S. C. 1. Ves. 3. Tho' this court does not take customs so strictly certain as courts of law, yet it requires them to be substantially laid.

THE bill was brought for a substraction and account of tithes, against the inhabitants and occupiers of *Hinckley* in *Leicestershire*.

The defendants insist upon a contributory modus of 17 *s.* for the lands which they hold of the hamlet of *Hide* in the same parish.

The dean and chapter of *Westminster*, who are the rectors do not in their answer disclaim the right to the tithes, but refer to their lessee, who apprehended she had no right, and has never collected them.

Mr. Attorney General for the defendants.

He said, a vicar of common right is not intitled to tithes, but by virtue of an endowment or grant from those, who were the owners of the land.

An

CARTE v. BALL.

An ancient payment *for tithes* is a *modus*, and supposes an agreement originally.

LORD CHANCELLOR,

A general charge of an endowment is sufficient to intitle the plaintiff to shew an endowment at the hearing, without mentioning *the particular sort of endowment*.

Mr. Attorney General then went on and said, The receipts run in this manner: *May* 1702, received then of *Robert Ball* the sum of eleven shillings and four pence for the tithe due at *Lady-day*, for his part of the *Hide grounds*. Signed *John Par*.

Other receipts called it the *Hides* only.

Mr. *Clark* of the same side cited *Hardcastle* versus *Smithson*, *July* 1745, before Lord *Hardwicke*, (*vide ante* 245,) to shew that the court will not construe the *modus* with great nicety where it is in general properly set out by the answer.

Mr. *Evans* of the same side: A rector has nothing to do but to make out his title to the rectory, and the tithes will be due of course to him, *but otherwise as to a vicar*.

There is no evidence arises from usage, for the plaintiff has not been able to shew the tithes were even paid to the vicar.

That a *terrier*, neither here, or at *nisi prius*, has been admitted to be evidence of the vicar's right, unless usage goes along with it.

Mr. Solicitor General for the plaintiff said, that in the case of *Berry* versus *Evans*, Lord Chief Baron *Comyns* solemnly determined, that even against a lay impropriator you cannot prescribe *in non decimando*, and in extraparochial places the King is intitled, and if it appears the rector is not intitled, the *vicar* must.

LORD CHANCELLOR.

This is an unusual demand, as it is a bill brought by an administrator of a vicar who was for 15 years together vicar of this parish, and yet during all the time of his incumbency no tithe was paid, nor demand ever made; but however, if the right appear, the plaintiff is intitled to a decree.

His right depends on two questions;

First, Whether, as standing in the place of the vicar, he has shewn a right to the tithes in kind.

Secondly, Whether the *modus* set up by the defendant's answer, is not a sufficient bar to that right. [498]

I will take up the second question first.

I am of opinion *the modus*, as stated in the answers of the defendant, is not sufficiently laid in point of law.

It is more correctly laid in the second answer, and is laid there in the following manner; seventeen shillings in the whole paid for the *Hides* in lieu and satisfaction of all tithes, 5*s*. and 8*d*. for the part of *Hides* in the occupation of such a person, 4*s*. and 4*d*. for the part in the occupation of another, and 7*s*. for the part in the occupation of another.

Two objections have been taken by the plaintiff's counsel, that it does not say the time when it is to be paid, nor enumerates the persons by whom it is to be paid.

Carte v. Ball.

As to the first, in the court of Exchequer, if a particular time was not laid, that court formerly would have over-ruled the *modus*, and not gone into the merits, but latterly they have very properly let in a greater latitude of proof, and it is sufficient if it is laid at a particular time, or *thereabouts* (1).

But the second is what I lay stress upon, that it is not said by whom it is to be paid, and I do not know any case in the books, or in experience, where it is not alledged to be paid by some body, and it is very reasonable it should be said by whom, because the parson may then be sure to whom he must apply, or against whom he may have a remedy for his tithes.

This cannot be supplied by saying that, in other parts of the answer, they have shewn the seventeen shillings have been paid by those persons who have held these lands, for that may be accidental; and though it has been said this court does not take customs so strictly certain as courts of law, yet this court requires customs to be substantially laid.

If before the court of Exchequer, where cases of this kind are more frequent, it would have been over-ruled at once.

The next question is upon the evidence.

No proof has been read to shew there ever was such an entire *modus* paid of seventeen shillings a year, but the defendants add several *modusses* together, and then, by computation in arithmetick, make just the sum of seventen shillings: In some measure like the Duke of *Grafton*'s case of fines, where, by looking into [499] the lord's books, they found what was the largest fine he took; and charged that sum to be the customary payment.

There is no evidence that these payments are applicable to the *modus*, and therefore I am of opinion it is not sufficiently made out.

Upon the opinion I have given as to this part, if the plaintiff had been *rector* I should have decreed at once for him, but a rector differs materially from a *vicar*.

To intitle himself to tithes, a rector has nothing to do but to prove himself so; as to a vicar otherwise, for he must shew an actual endowment.

A rector has, and so has a lay impropriator, a right to all the tithes in the parish, and has nothing to do but to prove himself rector (2); it is otherwise with regard to a vicar, for he must shew an actual endowment, or evidence of the usage.

In the first place, there is no evidence here of payment of tithes in kind, which will be a much more material consideration against a vicar than a rector.

Whether the answer be so formally drawn as might be, yet it is sufficient as to the denial of the plaintiff's right; for though the defendants admit *Carte* was vicar, yet they say they do not know or believe that he was intitled to the inclosed grounds of *Hinckley*, and to all or any part of the tithes.

(1) *Richards* v. *Evans*, 1 *Vesf.* 39.

(2) *Chapman* v. *Smith*, 2 *Vesf.* 506. *Ekins* v. *Dormer*, post, 534.

So

So that, by their anſwer, they inſiſt he was not intitled; but then it was argued for the plaintiff, that the defendants ſetting up a *modus* is an implication that the vicar was intitled to tithes, and to be ſure it is, but this does not preclude the defendants from objecting to the plaintiff's title, and it would be hard to preclude them, becauſe they fail in the defence they ſet up for themſelves.

CARTE v. BALL. Setting up a *modus* does not preclude the defendants from objecting to the plaintiff's title to tithes.

Suppoſe a plaintiff at law declares, and the defendant pleads any thing in bar, which by preſumption admits the demand, whereupon the plaintiff demurs, and the court holds the plea bad, yet they will ſtill ſee whether the plaintiff in his declaration has made a caſe ſufficient to intitle him to recover.

If a defendant pleads any thing in bar, which by preſumption admits the demand, and the plea is held to be bad, yet a court of law will ſtill ſee whether the plaintiff has made a caſe that intitles him to recover.

The plaintiff is, unfortunately for him, precluded by the rule of this court from reading the evidence of the endowment, which it is ſaid would have put this matter out of queſtion.

* The abbot of *Lyra* in *Normandy* has ſent a certificate of the original agreement between the rector and the vicar in relation to the tithes, but though it appears to come out of the abbot's hands, yet as it does not appear that it came out of the charter-houſe of the abbot, or that he was the proper officer to keep the records, it could not be admitted to be read.

A certificate of the original agreement between the rector and the vicar in relation to tithes, muſt appear to come out of the charter houſe of the abbot, and not out of his hands only, or it cannot be read.

Even before the reformation, a certificate from a foreign Abbey was not allowed (1); therefore, as the original deed relating to the endowment cannot be read, I muſt take it from the evidence before me, which is, that no tithe has ever been paid to the vicar. [*500]

A certificate from a foreign abbey was not allowed before the reformation.

The terriers are very dark, and I can hardly make any judgment of them, and it is very far from being clear from thence, that tithes in kind were ever paid to the vicar.

A vicar may not only be endowed of the tithes of a pariſh, but of *a penſion* likewiſe, and therefore how can I preſume he was endowed of the tithes, when he might be endowed of this annual payment by way of penſion.

A vicar may not only be endowed of the tithes of a pariſh, but of a penſion likewiſe.

If it depended upon this only, I would inquire, whether in any caſe tithes have been decreed in kind to a vicar, where there is no evidence of tithes having ever been paid to him in kind.

The dean and chapter, the rectors, do not diſclaim their right to the tithes; if they had, it might have put an end to the queſtion in favour of the vicar; this being the caſe, I am not ſatisfied he is intitled to the tithes in kind, and therefore it muſt be put in a method of trial.

(1) *Vide Colegrave* v. *Juſon*, *ante* 198.

CARTE v. BALL.

Where an impropriator's right does not come in question, he need not be made a party to a bill for subtraction of tithes.

It is said the rectors ought to be parties to the issue, but it is not necessary they should, for for where an impropriator's right does not come in question, he need not even be made a party to a bill that is brought for subtraction of tithes.

His Lordship directed an issue to try whether the vicar of *Hinckley* is intitled to tithes in kind, for the *Hamlet* of *Hide*, in the parish of *Hinckley*.

Case 171. *Rico* versus *Gualtier*, *May* 14, 1747.

[501]

The court cannot grant a *ne exeat regno*, unless the plaintiff swears positively the defendant is indebted to him in a certain sum.

MR. *Jones* moved for a *ne exeat regno* against the defendant upon this case, that the plaintiff, being a foreigner, was drawn in to give a bond in the penalty of 50*l.* and a warrant of attorney to enter up a judgment to the defendant, for the debt of a third person, and that, being ignorant of the *English* language, he did not know what the nature of the paper was that he had signed, and the defendant soon after took out execution upon the judgment, and the sheriff appraising a quantity of *leau de carme* at 8*l.* only, it was bought in at that price by the defendant, though the plaintiff swears by his affidavit that he verily believes it was worth 700 *l.* and the bottles alone 70*l.*

The bill was brought for the 700*l.* and charges the defendant sold part only of this seizure for 200 *l.* and prays to be relieved against it as a fraud.

Where a bill is brought for an account only, the plaintiff's swearing he believes the balance in his favour would amount to so much, will intitle him to a *ne exeat regno*.

LORD CHANCELLOR,

Notwithstanding there is an affidavit of a person who heard the defendant say he should quit the kingdom on account of the plaintiff's demand, yet I cannot grant a *ne exeat regno*, as the plaintiff does not swear positively the defendant is indebted to him in a certain sum (1): if the bill had been brought for an account only, the plaintiff's swearing he verily believes the balance in his favour would amount to so much, it would have been sufficient.

His Lordship denied the motion.

(1) *Anon. ante* 1 vol. 521. See Mr. *Cox*'s note to *Dane*'s case, 1 *P. W.* 263. 5th *Ed.*

Case 172. *Wilford* versus *Beaseley*, *May* 16, 1747.

Post, 503. S. C. but not S. P. Evidence in the cross-cause concerning the matters in issue in the original cause, not allowed to be read after a decree in that cause; otherwise as to the depositions in the cross-cause not relating to the matters put in issue in the original.

LORD CHANCELLOR,

THE plaintiff brought an original bill for relief, the defendant made a full defence; witnesses were examined, and a decree was pronounced against the defendant in *December*, 1745.

May 24, 1745, the defendant brought a cross-bill touching the same matters, put in issue in the first cause; the defendant answered, and the plaintiff in the cross-cause examined other witnesses,

witnesses, for the same matters put in issue by the answer in the original cause.

Which evidence was objected to as an inlet to perjury, and the objection was allowed as in a similar case of *Kamner* versus *Gulston*, *June* 25, 1745, if the defendant had not examined all his witnesses in the first cause, he should have enlarged the time for publication.

N. B. Publication passed in the original cause, *May* 4, 1745, and the decree was in the *December* following.

Mr. Attorney General for the plaintiff in the cross-cause insists, that the matters in the cross-cause are different from what they were in the original bill.

It is not material, said Lord *Hardwicke*, that all the defendant's witnesses were not examined to the matters in issue in the original cause, where any have been examined; if neither party had examined witnesses in the original cause, the court might be induced to admit the depositions to be read in the cross bill.

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Where neither party examines witnesses in the original cause, the depositions of witnesses examined to the same matters put in issue by that cause, may be read at the hearing of the cross-cause.

In the present case witnesses have been examined, and his Lordship refused the evidence in the *cross cause* to be read, touching the matters in issue in the original cause, but gave liberty to read any of the depositions in the cross-cause, not relating to the matters put in issue in the original cause.

Sherrard versus *Sherrard before the Master of the Rolls*, *May* 5, 1747. Case 173.

THERE was a settlement made by *Robert* Earl of *Leicester* in 1700, whereby an estate in [illegible]*ex* was limited to his four sons for [illegible] out impeachment of waste, *remainder to the heirs of the body of the settler*, and he charged upon the *Sussex* estate, together with the other estates, two several sums of 5000*l.* and 6000*l.* for younger children's portions. In 1720, the *Sussex* estate was decreed to be sold, and the said two sums to be paid off, and after payment thereof, the residue of the produce arising by sale, to be laid out in land to the same uses as in the deed of 1700, and in the mean time to be placed out in government securities, and by order of the 20th of *February*, 1720, *the interest and dividends were to go as the re*[illegible]*u prop*[illegible] *would, in case it was laid out in land*; upon the death of *Joceline* Earl of *Leicester*, the last tenant for life, the petitioners were intitled to the lands, as the persons next in remainder, under the settlement in 1700.

Where money [illegible] to be laid out in land and in the mean time invested in government securities, though a tenant for life die in the middle of a half year, shall not be apportioned, but be paid to the reversioner.

Earl *Joceline* died the 7th of *July*, 1743; the petition was for the payment of the entire half-year's dividend, amounting to 285*l.* accrued due at *Michaelmas*, 1743.

It was opposed by the administrator of Earl *Joceline*, the last tenant for life, who insisted, that by virtue of the order of the

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20th of *February*, 1720, which directed *that the interest should be paid as the rents and profits would*, it must be considered as if the money had actually been laid out in land, and therefore by the statute of 11 *Geo.* 2. *c.* 19. the dividend ought to be apportioned, and so much of the half-year's dividend as accrued in the life of tenant for life belonged to his representative.

The Master of the *Rolls*, (*William Fortescue*, Esquire.)

The constant usage has been, where money is to be laid out in land upon any settlement, and in the mean time invested in government securities, that the intire half-year's dividend shall be paid to him in reversion, notwithstanding the tenant for life died in the middle of the half-year, and shall not be apportioned (1); otherwise indeed in the case of a mortgage (2), and what makes this case the stronger is, that there was a power to grant leases, and in that case the counsel of the administrator of Earl *Joceline* admitted it would go to the reversioner.

(1) *Pearly* v. *Smith*, *ante* 260.
(2) *Edwards* v. *Countess* of *Warwick*,
2 P. W. 176.

Case 174. *Welford* versus *Beazely*, *May* 23, 1747.

1 Ves. 6. S. C. ante 501.

A Question arose upon the statute of frauds and perjuries, Whether a person *subscribing* a deed as a witness only, which she knew the contents of, could be said to have signed it within the meaning of that statute.

LORD CHANCELLOR,

Where an agreement has been reduced to a certainty, and the substance of the statute of frauds, &c. complied with in the material part, the forms have never been insisted upon.

The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other, and therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted upon (1).

The word *party* in the statute is not to be construed party as to a deed, but *person* in general, or else what would become of those decrees where signing of letters, by which the party never intended to bind himself, has been held to be a signing within the statute.

There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provision of it (2).

[*504]

Where there is a complete agreement in writing, and a person who is a party, and knows the contents, subscribes it as a witness only, she is bound by it, for it is a signing within the statute.

*Lord Chancellor denied the general doctrine as laid down in *Prec. in Chan.* 402. *Bawdes* versus *Amhurst*, though true as applied to that case by Lord *Cowper*, and said the difference be-

(1) See *Hawkins* v. *Holmes* 1 *P. W.* 770. *Stokes* v. *Moore et ux.* in *Serjeants' Inn Hall*, *March* 1st, 1786 and cited in note 1 *P. W.* 771.

(2) See *Clerk* v. *Wright*, *ante* 1 vol. 12, note 1.

twixt

twixt the two cases was, that the writing there, though all in the father's hand, was only a sketch of an agreement not settled or confirmed by the parties; but here the defendant signed it as a complete agreement, and, as she knew the contents, is to be bound by it in the present case* (1).

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* On a marriage treaty, the intended husband, and the young lady's father, went to a counsellor's chambers to have, in consideration of the portion the father proposed to give, a settlement drawn; minutes of agreement were taken down in writing by the counsel, and given by him to his clerk, to be drawn up in form: the next day the father dies, and the day following the marriage was solemnized: this agreement, notwithstanding these preparations, was held by Lord *Cowper* to be within the statute of frauds and perjuries. *Bawdes* versus *Amburst*, *Pr. Ch.* 402. 2 *Ch. Rep.* 284.

(1) The defendant previous to the marriage of her daughter with *Welford* agreed to give her a marriage portion of 1000 *l.* By marriage articles (to which the defendant was not a party), it was agreed that the 1000 *l.* should be vested in trustees for certain purposes therein mentioned. The defendant was a *witness* to the articles. Afterwards the defendant took *Welford* into partnership with her, and the above 1000 *l.* was agreed between *Welford* and herself to be a part of his share of the capital, and she gave him credit for it. It was decreed, that the 1000 *l.* should be paid to the trustees upon the trusts declared by the marriage articles. *Reg. Lib.* B. 1746. fol. 355.

Elton versus *Elton*, *May* 19, 1747. Case 175.

S. C. 1. Ves. 4. 1 Wils. 159. S. C.

Sir *Abraham Elton* by his will gives to his grandaughter *A. E.* the daughter of his son *J. E.* 1500 *l.* to be at her own disposal, in case she marry with the consent of *J. E.* and his wife; and in case of their deaths, before that time, then with the consent of their trustees, and not otherwise. A E. *died at* 14, *and unmarried:* J. E. *as the representative of* A. E. *is not intitled to the* 1500 l. *for the vesting of the legacy relating to the event of the marriage, as that never happened, the legacy did not vest* (1).

OLD Sir *Abraham Elton* by his will, "reciting that he "had a right and power to dispose of the sum of 1500 *l.* "being part of the money settled on his late deceased daughter *Elizabeth*, the late wife of *Peter Day*, Esq; and which "sum is now in his hands, says, Now I do hereby give and "bequeath the same, and all my right and interest therein, unto "my grandaughter *Anna Elton*, the daughter of my son *Jacob* "*Elton, to be at her own disposal, pursuant to the request of my said late* "*deceased daughter* Elizabeth Day, *in case she marry with the consent* "*and approbation of my said son* Jacob Elton *and his wife, and in* "*case of their deaths before that time, then with the consent and ap*-"*probation of their trustees, and not otherwise.*"

In 1729, the grandaughter died at the age of 14, and unmarried.

Jacob Elton, the father of the infant, brings his bill for the 1500 *l.* as her representative, insisting it was a vested legacy.

The principal defendants are the assignees under the commission of bankruptcy against Sir *Abraham Elton*, the eldest son of the testator, who claim the 1500 *l.* in his right, he being the residuary legatee of Dame *Mary Elton* his mother, who was

(1) So *Garbut* v. *Hilton*, *ante* 1 vol. 381. *Atkins* v. *Hiccock*, 1 vol. 500. *Pullen* v. *Ready*, *ante* 2 vol. 590. *Hemmings* v. *Munckley*, 1 *Bro. Cha. Rep.* 303. *Knap* v. *Noyes*, *Amb.* 662. *Vide* note 1. to *Harvey* v. *Aston*, *ante* 1 vol. 381

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the residuary legatee of old Sir *Abraham Elton*, and insist, that the grandaughter dying under age, and unmarried, the legacy never vested, and consequently, being lapsed, falls into the *residuum* of old Sir *Abraham Elton*'s personal estate.

Mr. *Attorney General*, counsel for the plaintiff, said, that this is to be considered as a condition subsequent, and therefore the marriage not happening, by the act of God, the legacy was become absolute.

The way of judging of conditions precedent and subsequent, is not to determine it one way or another by the particular words, but by the whole tenor; and for this purpose he mentioned the case of *Peyton* versus *Berry*, 2 *Wms.* 626. one devises the residue of his personal estate to *J. S.* provided she marries with the consent of his two executors; on the death of one, the condition (being a subsequent one) is become impossible, and she may marry without the consent of the survivor.

The case the testator had in view was not *Anna Elton's marriage in general*, but to prevent her marrying improvidently; and the words *not otherwise*, do not mean if she does not marry at all, she shall not have it; but if she marry otherwise than with the consent and approbation of *Jacob Elton* and his wife, *&c.* that the testator considered the words as *in terrorem*, and vested in the legatee, as much as if the condition had not been inserted at all.

He cited likewise the case of *Ward* versus *Trigg* (1), in the court of exchequer, *Easter* term, 1746, "I give to my daughter four "hundred pounds if she marries with the consent of her mother; "but if she marries without the consent of her mother, then to "fall into the *residuum* of my personal estate."

The daughter did not marry at all, but died after twenty-one, and by her will gives the four hundred pounds to the plaintiff, who brought his bill for it, *and the court held it to be a vested legacy, and well disposed of by the will, though the daughter died unmarried.*

Mr. *Noel* of the same side said, that the testator's object was not to defeat the legacy to his grandaughter, but the effect of that paternal care he had for her, that if she married at all, it should be with the approbation of her father and mother.

Mr. *Browning*, of the same side, cited *Semphill* versus *Bayley Prec. in Chan.* 562.

Mr. *Solicitor General*, for the defendant, allowed it was a clear settled point, that a restraint of marriage, whether a condition
[506] precedent or subsequent, if it be a legacy of personal estate, is a void condition unless given over on the condition's not being performed.

It was given at a time when both the parents were living, who were bound to maintain her, and takes away all the implications that might otherwise arise.

But the whole will turn upon this, when is the time of payment? *I give to my grandaughter* Anna Elton *to be at her own disposal*, I ask when? If the testator has fixed no time, *immediately?*

(1) 1 *Ves.* 5 S. C. cited.

But

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But then the will saying, *in case she marry with the consent and approbation of my son* Jacob Elton *and his wife*, &c. shews he did not intend it should be at her own disposal *unless she married.*

And it is reasonable to suppose this his intention, because the testator, and *Elizabeth Day*, the aunt of *Anna Elton*, knew that her father would provide for her, and intended this only as an addition if there should be a marriage.

That *dies incertus conditionem in testamento facit*, is the rule of civil law, and though they do not hold a marriage with consent to be necessary, yet they say, where it is given on condition of marriage, there must be a marriage. *Dig. lib.* 35. *tit.* 1. *de conditionibus & demonstrationibus, &c. Lex* 75. & *id. Lex* 68. *Si ita legatum erit, cum nupserit: Si nupta fuerit, & hoc testator scisset, alterum matrimonium erit expectandum; nihilque interérit utrum vivo testatore, an post mortem ea iterum nupserit.*

Mr. *Brown*, of the same side, cited the case of *Garbut* versus *Hilton* (1), *November* 26, 1739, before Mr. *Verney* at the *Rolls*. *A.* gave a legacy of 100 *l.* to *B.* provided she married with the consent of her father and mother, and the survivor of them: *B.* brings her bill for the legacy while she is single, and Mr. *Verney* held it did not vest till her marriage, and dismissed her bill.

Mr. *Wilbraham* of the same side said, only transpose the words instead of I give 1500 *l.* to *Anna Elton*, to be at her disposal in case she marries, suppose the testator had said, *in case Anna Elton marries, I give* 1500 *l. to be at her disposal*, and there could have been no doubt, but there must have been a marriage to make it vest.

LORD CHANCELLOR,

The general question is, whether it was a vested legacy in *Anna Elton* at the time of her death, and that will depend on the construction of the clause in the will, and the authorities of this court.

His Lordship then stated the devise to *Anna Elton*.

As to the clause in a former part of the will, in which the testator gives 1000 *l.* to *Anna Elton*, his granddaughter, at twenty-one, or marriage, which should first happen, I shall consider it afterwards. [507]

It has been insisted for the plaintiff, that the legacy vested in *Anna Elton* immediately on the death of the testator, and therefore, notwithstanding she is dead unmarried, that he, as her representative, is intitled to it, and that the whole of this is a condition subsequent, and her dying before marriage being the act of God, it does not therefore defeat the legacy.

But I deny this absolutely, and hold it to be a condition precedent, though whether a condition precedent or subsequent, it makes no difference; but that this is a condition precedent appears from the words, for whether a testator says in case she mar-

(1) *Ante* 1 vol. 381. S. C.

ries

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ries I give, or I give in caſe ſhe marries, it makes no difference, but in both caſes it is annexed to the ſubſtance of the deviſe; the words *to be at her diſpoſal* do not vary the caſe, for whoever gives a legacy gives it to be at the diſpoſal of the legatee, and thoſe words cannot be ſeparated from the words *I give*; it is plain therefore upon the words that it is a condition precedent, and dependent upon the marriage.

Suppoſe this young lady had, immediately on the death of her grandfather, brought a bill here for the legacy, the court could not have decreed it, for the time is annexed to the ſubſtance of the legacy, and therefore is ſtronger than the caſe of *Atkyns* verſus *Hucocks*, 1 *Tr. Atk.* 500. which was annexed to the payment only, and is called by the civil law *execution of the legacy*, and in this reſpect, I govern myſelf a good deal by the caſe of *Garbut* verſus *Hilton* at the *Rolls* (1).

It has been ſaid by Mr. Attorney General, it is very improbable the grandfather would make ſuch a diſpoſition, as might keep it poſſibly in ſuſpence during the whole life of the grandaughter.

Could ſhe have had the intereſt if ſhe had brought her bill? Certainly ſhe could not; for where intereſt is not given by a grandfather, ſhe is not intitled to it; otherwiſe where a legacy is given by a father, becauſe if he does not provide maintenance, the court will give intereſt in lieu of it, though the legacy be payable at a future day.

The civil law does not make any difference whether the condition is precedent or ſubſequent, for there any reſtraint of marriage is void, but then this court and the civil law do both require *the factum* of the marriage ſhould be performed.

[508] Whether it is taken in the ſenſe of a condition, or in the ſenſe and meaning of a time of payment, it is the ſame thing, for the rule is *dies incertus in teſtamento conditionem facit*.

When it is given to be paid at twenty-one, the time is certain, and known to an hour, and therefore held to be tranſmiſſible; but where the time is *uncertain*, it has been held not to veſt till the contingency happens, *becauſe it cannot be aſcertained whether it will ever happen or no*.

I do agree there is an ambiguity in the words *not otherwiſe*, whether they relate to the words immediately antecedent, or to the whole clauſe.

It has been contended for by the plaintiff, that they relate only to the words immediately antecedent; but I do not know what warrant there is to confine theſe words only to a part of the ſentence, but they muſt run through the whole, and means that he does not give it unleſs there ſhould be a marriage.

In the caſe of *Atkyns* verſus *Hucocks*, I determined upon the ſame foundation, and the ſame principles I go upon in the preſent, though, as I ſaid before, that is a ſtronger caſe, for there in the gift of the legacy the time was not annexed to the ſubſtance of the legacy, but to the payment only, and yet the

(1) *Ante* 1 vol. 381. S. C.

ground

ground of my determination was, that the vesting of the legacy related to the event of the marriage, and as that never happened, the legacy did not vest.

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There it was a legacy given by the father as a portion, but in the case of a grandfather, he is not bound by that duty of nature to provide for a grandchild, especially in this case, where a father was living at the time of the will, and after the death of the testator.

A grandfather is not bound to provide for a grandchild, especially where a father is living at the time of the will, and after the testator's death.

In the case of a devise by a grandfather to a grandchild, of a copyhold estate where there is no surrender, the court will no supply it against an heir at law; and so held in the case of *Kettle* versus *Townsend*, 1 *Salk*. 187 (1).

Where there is no surrender of a copyhold estate by a grandfather to the use of his will, the court will not supply it against an heir, in favour of the grandchild.

I am of opinion from the whole texture of this will, that the legal construction agrees with the intention of the testator.

The will speaks that the grandfather meant this legacy as an addition to her fortune, *in case she married*, for in a former clause of the will he had given her another legacy of 1000 *l*. either at twenty-one, or marriage, which should first happen, so that if she had lived to be twenty-one, and had died unmarried, yet she would have been intitled to something.

It might have been a question, whether the words *to be at her own disposal*, were not giving it to her separate use, but if they were not, it would have made no difference, because her relations might before the marriage have secured it for her separate use. [509]

The case of *Atkyns* versus *Hiccocks* is in point, and whether right or no, has not been appealed from; and I shall not be inclined to deviate from my own opinion, which was given upon mature consideration* (2).

* A testator devises to *E. H.* 200 *l*. to be paid her at the time of marriage, or within three months after, provided she marry with the approbation of his two sons. *E. H.* died after 21, but without being married. Bill brought by her representative for the legacy. *Per Lord Hardwicke*, In all cases where the condition of marrying is annexed, it is necessary there should be a marriage to vest the legacy. *Atkyns* versus *Hiccocks*, *Tr. Vacation* 1737. 1 *T. Atk*. 500.

(1) *Prec. Cha*. 477. S. C. *Goodwyn* v. *Goodwyn*, 1. *Vef*. 228. *Tudor* v. *Anson*, 2 *Vef*. 582.

(2) Bill dismissed. *Reg. Lib*. A. 1746. fol. 396.

Flanders versus *Clarke*, *May* 20, 1747.

S. C. 1 Vef. 9.

MArgaret Flanders, by a will dated the 15th of *November* 1733 "bequeathed to her son *John Flanders* one hundred "and fifty pounds, to be paid to him by her executors therein "named, at such times, and in such proportions, as they "should judge necessary for him, and declared her will to be, "that

The power of execution is not determined by the death of one, but the whole survives to the other, and he may assent to a legacy.

FLANDERS v. CLARKE.

"that the said *John Flanders* should not have the disposition of "the said legacy to his then, or any future wife, but that in "case of his death without issue, the same should revert unto "the said testatrix's family; But in the mean time she directed "her executors by half-yearly payments to pay the said *John* "*Flanders* interest after the rate of *five per cent.* for such parts of "the said principal as should from time to time continue in their "hands, till the whole should be paid."

The surviving executrix of the mother directs the hundred and fifty pounds by her will to be paid within two years after her death.

The bill is brought by the legatee for the hundred and fifty pounds, and insists he has a right to be paid the whole.

LORD CHANCELLOR,

The clause in this will is so particular, that it cannot be determined by any general rule, but on the penning of the will.

To take the clause by its particular parts, *Margaret Flanders* "bequeaths to her son *John Flanders* one hundred and fifty "pounds, to be paid to him by her executors, at such times and "in such proportions, as they should judge necessary, and de- "clared that her said son should not have the disposition of the "said legacy to his then, or future wife, but that in case of his

[510] "death without issue, the same should revert unto the said tes- "tatrix's family."

If it had rested there, I should have been of opinion *John Flanders* should have had the usufructuary interest only, and it would have gone over on his leaving no issue at his death; for, as I said at first, the particular penning ties up the words to issue living at the time of his death (1), and points out the particular time when he might make the disposition, and shews therefore it was a particular time, and a particular dying without issue, that was meant by the testatrix.

But in the mean time she directed her executors, by half-yearly payments, to pay the said *John Flanders* interest at the rate of five *per cent.* for such parts of the said principal as should from time to time continue in their hands *till the whole should be paid*.

Her intention seems to be, that her executors should have a power of paying the whole, or in part, as the trade, dealings, or occasions of the son should require, and that he might spend or dispose of this as he thought proper, but while any part of the hundred and fifty pounds remained in the executor's hand, to be subject to the will.

It has been objected that the assent of the executors is necessary to every legacy (2), and here being two under the will of *Margaret Flanders*, and one dead, the survivor cannot assent.

I do agree, whether it be a specific legacy, or a pecuniary one, the assent of the executor is necessary, but the power of executors

(1) Vide *Hodgson* v. *Bussey*, ante 2 vol. 9, note.

(2) *Northey* v. *Northey*, ante 2 vol. 77.

is not determined by the death of one, for the whole survived to the other executor (1), and she might assent.

This comes near the case, in *Fitzgibbons's Reports*, *of the Attorney General in behalf of the Goldsmiths' Company of London* versus *Hall* 314. where what the court went upon was the limitation over was void; for as the son had a power to spend the whole, the company could have no more than he should have left unspent, and therefore dismissed the bill.

The legacy in the present case amounts to the very same; here is a power to spend the whole, and for the executor to pay to the son of the testator from time to time, either part of the hundred and fifty pounds, or the whole, as the occasions of the son should require.

This being too a provision made by a mother for a son, I am of opinion the legacy ought to be paid to him, without his giving any security; and decreed accordingly (2).

(1) So *Attorney General* v *Gleg*, *ante* 1 vol. 356 *Jacomb* v *Harwood*, 2 *Vef.* 265.

(2) *Reg. Lib.* A. 1746. fol. 656.

Petre versus *Petre*, *May* 20, 1747. Case 177.

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LORD CHANCELLOR,

THE court will not oblige a jointress to bring in her jointure deed into court, or before a Master, unless the requiring it will confirm her jointure (1), but will direct her only to deliver in a schedule of the deeds, and the court at their discretion may order what shall or shall not be produced.

A jointress is not obliged to bring her jointure deed into court, unless the party requiring will confirm it.

Where there is a numerous family of children who are infants, upon an application for maintenance for the eldest son, the court will make a liberal allowance to him, that he may be the better able to maintain his brothers and sisters, considering him in the light of the father of the family; but in the present case the eldest son being conveyed away clandestinely to *Doway*, out of the hands of the guardian, the court, as he cannot be brought before them, can make no order of this kind, but directed, after Lady *Mary Petre*'s jointure is satisfied, that the surplus rents and profits should be laid out for the benefit of the eldest son.

Upon an application for maintenance for an eldest son, the court will make him a liberal allowance, to enable him to maintain his brothers and sisters, considering him in the *parentis* (2).

(1) *Chamberlain* v *Knapp*, *ante* 1 vol. 52. *Lord Portsmouth* v *Lady Effingham* 1. *Vef* 430 *Leech* v *Trollop*, 2 *Vef.* 662. *Senhouse* v *Earl*, *ibid.* 450. *Ford* v. *Peering*; *Vef. junr.* 76. *Pyncent* v. *Pyncent*, post 571.

(2) *Laroy* v. *Athol*, *ante* 2 vol. 447.

Case 178. *Lady Head* versus *Sir Francis Head*, *May* 21, 1747.

The deposition of the *procbein amy* of the plaintiff cannot be read for the plaintiff, he being liable to costs.
S. C. ante 295. post 547.

THE defendant's counsel objected to the reading the deposition of *Jane Genew*, the wife of *John Genew*, for the plaintiff, as he is the *procbein amy* of the plaintiff, and liable to the costs.

The court allowed the objection.

Case 179. *Anon. Easter term*, *May* 21, 1747.

Notice must be given, before you can move to add new interrogatories for the examination of a defendant, on the examinations before put in being reported insufficient. Such an order obtained on a motion of course is irregular, and will be discharged.

AN order was obtained on a motion of course, that the plaintiff should be at liberty to add some new interrogatories for the examination of the defendant, the examinations already put in being reported sufficient, and that both sets of interrogatories may be answered at the same time.

LORD CHANCELLOR,

I find no instance of an order of this sort, on a motion of course; it has some analogy to orders for amendment of bills, where answers have been reported insufficient; and if this practice is not of course for adding interrogatories, on an examination being reported insufficient, I will not set up this as an instance, and thereby introduce a new practice.

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The court has rather gone too far in allowing the amendment of bills on answer's being reported insufficient.

I think the court has rather gone too far in allowing the amendment of bills, on answers being reported insufficient, as it has frequently been made use of as a scheme and method of delay.

If the party wants to add new interrogatories, on an examination reported insufficient, an application should be made to the court by notice to the other party, that the court may be apprized whether there is a ground for it; but as this was an order obtained on a motion of course, the court thought it irregular, and discharged the order.

Case 180. *City of London* versus *Nash*, *May* 25, 1747.

S. C. 1 Ves. 12.
Where a person on a building lease covenants to new-build the brick messuages, on the premisses, the rebuilding some and repairing others is not sufficient to answer the covenant, but the lessee must re-build the whole.

LORD *Hardwicke* stated the case as follows:

The bill is brought by the city of *London* against *Nash*, to have a specific performance of an agreement for a building lease of some old houses near *Leaden hall* market.

The

City of LONDON v. NASH.

The points in the cause are, what is the true intent of the covenants in the lease and agreement entered into between the city of *London* and *George Greaves*, a builder, the original lessee, and whether the covenants are sufficiently performed?

Another point has been made on the circumstances of fraud and misbehaviour in obtaining of this lease, the defendant being at that time a committee-man for letting the city lands.

It appears these were very old houses, and that the city had an intention by their committee for letting the city lands to let these premisses in the year 1734, an order thereupon was made to survey the premisses on the first of *May*, and it was reported they were much out of repair, and proper for *a repairing lease*.

The utmost term allowed for repairs is one and twenty years, but the city are not bound down upon *building leases* for any certain term.

The proposals for taking a repairing lease were rejected, and came to nothing. The consideration of these houses was taken up again in 1736. Mr. *Nash*, who was then of the committee, was appointed to inspect.

The 3d of *November*, 1736, a report was made, to which *Nash* was a party: in pursuance of an order in *May* before, that the inspectors were of opinion the houses ought to be rebuilt, as they are in a very bad and ruinous condition, and to which report Mr. *Nash* signed in the first place, on the 4th of *November*, 1736, an advertisement was ordered to be put in the publick papers, that the premisses were to be let on a *building lease* of 61 years. [513]

Every one of these acts import in the strongest manner a building lease.

Mr. *George Greaves* offered to give the city a 1000*l.* fine upon a 61 years lease, and that proposal was accepted, and he was declared the best bidder: after this a draft of a lease was prepared, in which were these words, the lessee to new-build the premisses, *or any part thereof*; but it appears that the words, *or any part thereof*, were struck out in the draft, and left out in the original; the lease was to be approved of by two of the committee-men, and was so accordingly, by Mr. *Heaton* and the defendant *Nash*.

Afterwards this lease was executed on the 8th of *February* 1736, and those words, *or any part thereof*, being left out, proves they had been under the consideration of the whole committee, and dropped by their express direction.

Mr. *Greaves* came into possession under this lease.

The first question was, what is the true intent and meaning of the covenant.

It was insisted by the counsel for the city of *London*, the meaning is, that all the messuages should be entirely *new-built*, whereas but two have been new built, and the rest repaired.

And by the counsel for the defendant *Nash*, that if he built new messuages in the plural number, (which must be two at least),

City of London v. Nash.

least), and the rest were put into repair, that this is sufficient to answer the covenant.

I am of opinion the true construction is, all the messuages should be rebuilt.

Mr. *Greaves* covenants that he will new-build the brick messuages on the premisses within the compass of three years.

What can be the meaning of such a covenant? Why, to rebuild the whole, for *an indefinite proposition is equal to an universal proposition*, for had it been left to Mr. *Greaves*'s discretion to build two, or three, or four houses, it would have been so very uncertain, that it could never be the meaning.

It was an omission that there was not a plan annexed to the lease, describing what sort of houses *Greaves* was to build.

If there could be any doubt upon the covenants, it must be considered on the nature of the contract, what does that import? A building lease even *by the term only*, which is for 61 years.

Suppose an action at law had been brought, and in that action the city of *London* had assigned a breach, that *Greaves* had not performed the covenant in new-building all the premisses, and the defendant had pleaded he had built two houses, the plaintiff must have had judgment, for building two only is not a performance of the covenant.

The distinction between a repairing and a building lease appears by the acts done by the city; on the two reports of repairs, that no person had appeared to make proposals, an advertisement was thereupon ordered for proposals to build, contract, &c. All this speaks an intention of letting *a building lease* in opposition to and in contradistinction to *a repairing lease*.

It has been proved by Mr. *Dance* the city surveyor, that on a repairing lease, the city of *London* never let but for 21 years, but if on a building lease for 61, or more, and then all the premisses shall be new-built.

But what greatly strengthens the case, is, the insertion of the words, *or any part thereof*, in the draft, and their being struck out afterwards, which shews the city of *London* saw this would be an evasion, and struck out these words to prevent any misapprehension in the sense of the lease.

The defendant is now contending for the very thing which the city disagreed to, and disapproved of, before the lease was executed.

An observation has been made on the part of the defendant, that there is no mention in the advertisement that *all* the premisses were to be *new-built*; but to be sure the true construction is, that *all* are to be new-built.

The next question then will be, whether that has been performed?

Pulling down the fore and back front of houses and rebuilding them, is not equivalent to houses intirely new-built, for they very often drop down afterwards.

I am of opinion it has not; for all the defendant has done, is to build *two new houses*, and to repair the old; and though it is indeed a very large repair, for he has pulled down the fore and back fronts, and new-built them, and that what are chiefly

left

eſt are party walls, yet this is very different from new-building of houſes, for notwithſtanding new-fronting houſes, they very often drop down afterwards, and therefore are not equivalent to houſes entirely new-built. City of LONDON v. NASH.

A great deal of evidence has been read to prove that this is a ſubſtantial repair, and that the houſes will be as good at the end of 61 years to let on a repairing leaſe, as if new built.

The witneſſes vary, and it is difficult to reconcile them, unleſs taken in the ſenſe in which it is ſworn and explained by one of the witneſſes, who ſwears he could have built all theſe houſes for a hundred pounds a houſe, provided he was not tied to a proper thickneſs of walls, &c. and I believe he might; but though Mr. *Greaves* was not confined to particular dimenſions, yet it muſt be underſtood that the whole ought to be built in a proper workman-like manner.

The next queſtion will be, what kind of decree I ought to make; it was inſiſted at the beginning of the cauſe for the plaintiffs, that they are intitled to a ſpecific performance, and that the defendant muſt rebuild all the houſes, which by neceſſary implication will import that the defendant muſt pull down all the houſes which have been only repaired, and new-build them.

It was objected on the part of the defendant, that the plaintiffs are not proper to come here for a ſpecific performance, but ought to be left to their action at law.

Upon a covenant to build, the leſſors are clearly intitled to come into this court for a ſpecific performance, otherwiſe on a covenant to repair.

The objection will not hold, for upon a covenant to build, the plaintiffs are clearly intitled to come into this court for a ſpecific performance (1), otherwiſe on a covenant to repair; for to build is one entire ſingle thing, and if not done prevents that ſecurity which the city of *London* has for the rent, by virtue of the leaſe.

But the moſt material objection for the defendant is, that the court is not obliged to decree a ſpecific performance where it will be attended with great loſs and hardſhip to one of the parties, and though not ſpecifically performed, yet the defendant has laid out 2200*l.* at leaſt in the repairs, and therefore to be ſure, has put them in a very good condition at preſent.

Now, if the defendant was miſtaken in the ſenſe of this covenant, or perhaps has even knowingly evaded it, ſtill it would be hard to decree a ſpecific performance, and ſuch a decree too would be contrary to the good of the public, by pulling down houſes, which from the evidence chiefly appear to be in ſuch a good condition, as that they may ſtand a great number of years.

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It would be of no ſervice to the city of *London* to make ſuch a decree, for all they want is to be compenſated in damages, and therefore the court ought not to make a decree for a ſpecific performance.

But then it has been ſaid on the part of the defendant, if ſo, there is no occaſion for any other decree in this court, but the plaintiff ſhould be left to law.

(1) *Sed vide Lucas* v. *Commerford*, 3 *Bro. Ch. Rep.* 166.

City of London v. Nash.

Now though this is a covenant unperformed, and runs with the land, and will affect an aſſignee, yet if the breach was made before the aſſignment it will not affect him (1), and if an action were brought againſt the repreſentatives of *Greaves*, then they muſt come into court againſt *Naſh* for an indemnity; and this would occaſion a circuity.

So that the queſtion will be, what the relief is I ought to give, whether an action, or whether I ſhall direct an iſſue.

I ſhall not direct an action, becauſe all proper parties are before me, the repreſentative of the original leſſee, and the aſſignee of the leaſe, but I ſhall order an iſſue.

It is evident to me, that this leaſe has been obtained in an improper manner, taken by Mr. *Greaves* as a truſtee only for the defendant Mr. *Naſh*, and appears to be plainly a beneficial leaſe: Mr. *Greaves* dies before the three years expire for building theſe houſes, and his adminiſtrator aſſigns this leaſe, for the conſideration of five ſhillings only, to Mr. *Naſh*.

All the other circumſtances ſhew that this was taken originally for Mr. *Naſh*'s benefit, becauſe no body can imagine Mr. *Greaves*'s repreſentative would have aſſigned it over for ſo ſmall a conſideration as five ſhillings, if Mr. *Greaves* had ever had any beneficial intereſt.

The excluding a member of the committee of city lands from being a buyer or a ſeller is a good rule as it prevents fraud.

Mr. *Naſh* likewiſe is a member of the committee of city lands, and all committee-men are expreſsly excluded from being a buyer, or a ſeller, which is a good rule, and hope they will continue it, becauſe it prevents fraud and colluſion.

This was a ſcheme of Mr. *Naſh* to increaſe the term to 61 years, inſtead of 21, and yet to do nothing more than repair, notwithſtanding the term in the leaſe is trebled; and though Mr. *Naſh* has twice under his hand reported they were in a very bad and ruinous condition, ſtill he has thought proper to examine witneſſes to prove they were in a good condition, and fit to be repaired.

[517] I ſhall give more credit to his own report than to his witneſſes.

The court, inſtead of decreeing a ſpecific performance of the covenants in the leaſe, choſe to give relief by way of inquiry of damages before a jury, and directed an iſſue accordingly.

The relief muſt be by way of inquiry of damages before a jury; and I am more inclined to this, than to decree a ſpecific performance, becauſe it appears upon the diſpute of the extent of the buildings, that there was a formal committee with *Mr. Dance the ſurveyor of the city of London*, at the head of it, viewing the repairs, while the workmen were employed about it, and yet made no objection to Mr. *Greaves*'s going on, and therefore are too late in coming here for a ſpecific performance unleſs they had brought a bill recently and immediately after this ſurvey.

Lord *Hardwicke* directed an iſſue to try what damages the mayor, commonalty and citizens of *London* have ſuſtained, by the non-performance of the covenants in the leaſe to Mr. *Greaves*, and appointed the city of *London* plaintiffs, and *Naſh* alone defendant.

(1) *Vid. Valliant* v. *Dodemede, ante* [illegible]*, Southwark* v. *Smith*, 3 Burr. vol. 546, 548. *Churchwardens of St* [illegible] 1271.

Godfrey versus *Watson, March* 21, 1747. *It came before the Court on Exceptions to a Master's Report.* Case 181.

Where a creditor by judgment extends lands by *elegit*, he holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot on a writ *ad computandum* insist on the creditor's doing more than account for the extended value; but if the debtor comes here for relief, the court will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, will direct the debtor to pay interest to the creditor though it should exceed the principal.

A creditor is not confined to the extent of the penalty upon a judgment, but may carry the computation of interest beyond it.

THE first exception was for not allowing the sum of three hundred eighty one pounds, being the surplus interest beyond the penalty of a judgment (1).

It was said by the plaintiff's counsel, that the creditor is intitled only to the extent of the penalty upon a judgement; and that he can carry the interest no further.

LORD CHANCELLOR,

At law, upon a judgment entered up, it is the *debitum recuperatum*, and the stated damages between the parties; but if the creditor does not take out a *fieri facias* against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law the debtor cannot, upon a writ *ad computandum*, insist upon the creditor's doing more than account for the extended value; but if the debtor comes into a court of equity for relief, this court will give it him, by obliging the creditor to account for the whole that he has received; and as a person who comes [518] for equity, must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal (2); and I remember very well upon serjeant *Whitaker*'s insisting before Lord Chancellor *Cowper*, that this would be repealing *the statute of Westminster*, his Lordship said he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.

Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of the judgment, but is intitled to interest upon the debt secured by judgment, though it exceeds the penalty.

And the same rule prevails in this court, where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of the judgment, but shall be intitled to interest upon the debt secured by judgment, though it exceeds the penalty, down to the time the principal is paid off; and therefore his Lordship allowed the defendant's exception.

(1) This does not appear in *Reg. Lib.* A. 1746. fol. 706.

(2) *Sed vide Bromley* v. *Goodere*, ante 1 vol. 80. note 2.

GODFREY v. WATSON.

A mortgagee in poſſeſſion is not obliged to lay out money any further than to keep the eſtate in neceſſary repair. He may add to the principal of his debt a ſum expended in ſupport of the mortgagor's title where it is impeached, and it ſhall carry intereſt.

Lord Chancellor ſaid, that a mortgagee in poſſeſſion is not obliged to lay out money any further than to keep the eſtate in neceſſary repair; but if a mortgagee has expended any ſum of money in ſupporting the right of the mortgagor to the eſtate, where his title has been impeached, the mortgagee may certainly add this to the principal of his debt, and it ſhall carry intereſt.

A mortgagee ſhall not be allowed for his trouble in receiving the rents of the eſtate himſelf; but if the eſtate lies at ſuch a diſtance as obliges him to employ a bailiff to receive them, what he paid to the bailiff ſhall be allowed.

He alſo ſaid, a mortgagee ſhall not be allowed for his trouble in receiving the rents of the eſtate himſelf (1), but if an eſtate lies at ſuch a diſtance from the place of his reſidence, as he muſt have employed a bailiff, if it had been his own, he ſhall then be allowed ſuch ſums as he has paid to a bailiff, to receive the rents of this eſtate.

(1) *Bonithon* v. *Hockmore*, 1 *Vern.* 316. *French* v *Baron*, *ante* 2 vol. 120.

Caſe 182. *Ex parte Ricards, June 18, 1747.*

A father by will appoints his wife guardian of his eldeſt ſon till 21. A petition on the infant's behalf to confirm her guardian, and to be juſtified in what ſhe ſhould expend for his maintenance. No inſtance where there is a teſtamentary guardian of the court's confirming it in this ſummary way, or ſending it to a Maſter to aſcertain the allowance for infant's maintenance, a bill is neceſſary for this purpoſe.

THE father of the petitioner by his will appoints his wife guardian of the petitioner, his eldeſt ſon, and likewiſe of his ſecond ſon, till their ages of twenty-one, and allows a maintenance for the ſecond during his infancy, but none for the eldeſt.

A petition was preferred on behalf of the eldeſt ſon and infant of eight years of age, to confirm his mother guardian, and that ſhe might be juſtified in what ſhe ſhould expend in his maintenance, and prays it may be referred to a Maſter, to conſider of a proper allowance for the infant's maintenance and education.

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LORD CHANCELLOR,

Sir *Joſeph Jekyll* was the firſt judge who went ſo far in this ſummary way to direct an allowance for maintenance; before his time the court would do no more than appoint a guardian in ſocage, till the infant had attained his age of 14; but I know of no inſtance, where there is a teſtamentary guardian, that the court have in this ſummary way confirmed the guardianſhip, or ſent it to a Maſter to aſcertain what ſhall be allowed to the guardian, for the infant's maintenance, and thought a bill neceſſary for this purpoſe (1); but at the Attorney General's requeſt,

(1) *But ſee* 2 P. W. 120 *Harg. Co. Litt.* vol. 14. *Ex parte Whitfield, ibid* 315. 88 b. n. 10 *Mellish* v. *De Coſta, ante* 2

as the application appeared to be a very reasonable one, his Lordship ordered the petition to stand over till the next day of petitions, and in the mean time to search for precedents. *Ex parte* RICARDS.

Ex parte Edwards, June 18, 1747. Case 183.

THE mother by her will appointed Mr. *Russell* guardian to her son the petitioner, till his age of twenty-one.

The mother's appointment of a guardian to her son by will is void, the statute confining the power of appointing a testamentary guardian to the father only.

An application made now to the court for maintenance, and in case they should not approve of the guardian appointed by the mother, that a new one may be assigned.

LORD CHANCELLOR,

The statute of 12 *Cha.* 2. *ch.* 24. *sect.* 8. confines the power of appointing *a testamentary guardian to the father only*, and therefore the appointment by the mother, of a guardian in this case, is absolutely void, and the infant being of his age of fourteen, chose a guardian in court (1).

(1) With respect to the learning on guardianship, *vide Harg. Co. Litt.* 88. *b.* notes, 11, 12, 13, 14, 15, and 16.

On the Petition of the Marquis of Powis in the Cause of Nicholls versus Maynard, June 18, 1747. Case 184.

THE late Marquis and the petitioner joined in mortgaging an estate for securing twelve thousand pounds borrowed of Sir *Charles Gunter Nicholls* deceased, with interest at four and a half *per cent.* but there was a verbal agreement, that if the mortgagor paid the interest for every half year before the third quarter became due, that the mortgagee would allow him an * abate of half a *per cent.* At the death of Sir *Charles Gunter Nicholls*, there was a considerable arrear of interest, and the mortgagor proposed, if the defendant, the trustee for the plaintiffs, daughters of Sir *Charles Gunter Nicholls*, and devisees of the twelve thousand pounds, would agree to take four *per cent.* for the arrear of interest, that the mortgagor would be bound to continue the mortgage for seven years; upon this proposal it was referred by the court to a Master to see if it was for the benefit of the infants; the Master reported it to be so, and that report was confirmed, and afterwards the interest was regularly paid at the end of every half year, before the third quarter was lapsed, to the late Marquis's death. [*520]

Where a mortgage is at four and an half *per cent.* with a proviso that if the interest be paid after each half year before three quarters of a year become due, the mortgagee will accept of four *per cent.* if the mortgagor fails of paying the interest at the appointed time, *he cannot be relieved in this court.*

The petitioner having been entangled in a great many perplexed affairs, has suffered the interest to run considerably in arrear since, but now offers to the infant's guardian and trustee

NICHOLLS v. MAYNARD.

to pay the arrear of interest at four *per cent.* and as an equivalent for the other half *per cent.* interest upon interest, to be computed from the end of each half year; the simple interest and the interest upon interest amount together to a thousand and one pound eleven shillings.

One of the mortgagee's daughters is dead, and the whole beneficial interest in the twelve thousand pounds vests in the survivor.

It was prayed by the petition, with the desire of all parties, that, to save the expence of going before the Master, this sum may be ordered to be paid to the infant's trustee, on or before the 22d of *July* next, in full of interest due to the 22d of *December* last.

Where a mortgage is made with a reservation of four *per cent.* interest, and a proviso that, on non-payment thereof within a certain time after it is due, the mortgagor shall pay five, this is but as a *nomine pœnæ*, and relievable in equity.

I do not see how I can make such an order, as an infant is concerned; for as the mortgage is at four and a half *per cent.* with a proviso, that if the interest be paid after each half year, before three quarters of a year become due, the mortgagee will accept of four *per cent.* if the mortgagor fails of paying the interest at the appointed time, he cannot be relieved in this court (1), any more than on any other composition between parties, because the abate of half *per cent.* by the mortgagee was for prompt payment, and the terms of the agreement not being complied with, the mortgagee and his representative are intitled to interest at four and a half *per cent.* but if the mortgage had been made, with a reservation of four *per cent.* interest, with a proviso that upon non-payment thereof, within a certain time after it is due, the mortgagor shall pay five *per cent.* such proviso would not be good, and has been determined several times; because where the interest is to be increased, if not paid at the day, that is but as a *nomine pœnæ*, and relievable in equity (2). (*Vide Vin. Abridg.* title *Mortg.* 4, 2. letter *M.*)

Lord Chancellor referred it to a Master, to see whether the proposal made by the mortgagor, would be for the infant's benefit.

(1) *Jory* v. *Cox*, *Prec. Cha.* 160. *Brown* v. *Barkham*, 1 P. W 652 *Hammersley* v. *Booth*, *Barn Cha Rep* 451 *Ponsonby* v. *Rybot*, 3 *Burr.* 1374.

(2) *Holles* v. *Wyse*, 2 *Vern.* 289 *Shade* v. *Parker*, 2 *Vern.* 316 3 *Burr.* 1374. *Vide Hallifax* v *Higgins*, 2 *Vern.* 134. *Prec Cha.* 161.

Case 185. *Anon.* *June* 18, 1747.

[521]

A Master's report of what was due to a mortgagee for principal, interest and costs, was confirmed *nisi*, and by the Register's minutes at a subsequent seal in the same cause, it was taken down *order absolute*, but never entered, and the register refusing to do it, an application to the court for an order *de novo*.

IN the year 1707, upon a bill of foreclosure, it was referred to a Master to take an account of what was due to the mortgagee for principal, interest and costs, and the Master's report was confirmed *nisi*; and by the register's minutes, at a subsequent seal in the same cause, it was taken down *order absolute*, but never entered; the register refuses to enter it now, and the application is to the court for an order *de novo*.

LORD

LORD CHANCELLOR,

To enter an order *nunc pro tunc* is a motion of course, where the party intitled to the order comes recently; but I apprehend after a length of time, there ought to be notice of such motion; and what is prayed now goes still farther; but as it would be very hard at this distance to open a foreclosure, I will give the other side an opportunity of inquiring in the office, to see if they can make out the minute in the register's book, to relate to some other matter in the cause, and not the to foreclosure.

In the courts of law, for instance in the Common Pleas, where a recovery has not been entered upon record, if it appears by the minutes in the prothonotary's book that it was suffered at bar, the court will order it to be entered; but then it must be with a proviso, that it does not prejudice any subsequent purchaser; the same in the case of an old judgment, they will order it to be entered up, but so as not to affect a subsequent creditor; and therefore if in the present case it should appear on further search that it was the order *nisi*, which was made absolute for confirming the Master's report, I shall then direct according to the prayer of the petition.

ANON.

To enter an order *nunc pro tunc* is a motion of course where the party intitled to it comes recently, but after a length of time there ought to be notice of such motion.

Where a recovery in the court of Common Pleas has not been entered upon record, if it appears by the prothonotary's minutes it was suffered at bar, the court will order it to be entered, with a proviso it does not prejudice any subsequent purchaser. *Idem* as to an old judgment.

Gill versus *Watson*, *June* 25, 1747. Case 186.

[522]

INterrogatories were exhibited by the defendant for examining to the credit of one of the plaintiff's witnesses, notwithstanding publication has been passed some time, and the cause was to be in the pauper paper at the *Rolls* on *Saturday* next.

Though at law you can examine only to the general credit; yet, otherwise in equity, for as the witness there cannot be prepared to defend every particular action of his life, not knowing to what they intend to examine him; yet, on an examination here, he may be able to answer any particular charge, as he has time enough to recollect it.

Quære, If there is any such distinction between the examination here, and at law, with regard to examinations to the credit of witnesses, being told by an experienced practiser, that they are general here, as well as at law.

Mr. *Clial*, for the defendant, moved for liberty to exhibit interrogatories, and for a commission for examination of this witness into *Yorkshire*, but produced no affidavit to support the articles.

Lord Chancellor thought an affidavit necessary, and said, tho' at law you can examine only to the general credit, yet it is otherwise in equity; for at law the witness cannot be prepared to defend every particular action of his life, as he does not at all know to what they intend to examine him; but upon an examination in this court, he may be able to answer any particular charge, as he has time enough to recollect it: *Quære*, if there is any such distinction between the examinations here and at law, with regard to the credit of witnesses, because Mr. *Capper*, a very eminent and experienced practiser, told me, that examinations to the credit are general here, as well as at law, and the form of the interrogating articles are so in this case; first, that the witness is a person of ill fame, and not to be credited; secondly,

Gill v. Watson.

that he pays no regard to the nature of an oath; and in the same manner through the several *items*.

Lord Chancellor denied the motion, because the plaintiff comes too late after publication, and the cause was already set down in the paper.

Case 187. *Pearce* versus *Grove*, *June* 25, 1747.

S. C. Amb. 65. The court will not allow a defendant to amend an answer by striking out of it the admission of a fact (1), by which the plaintiff would be deprived of the benefit of this evidence, especially as he does not swear he was surprised into it, or ill advised in setting it forth.

MR. Attorney General moved to amend an answer, by striking out the offer of the defendant's bringing in his share into hotchpot, upon a miscomputation of the father's estate.

[523] Lord Chancellor,

Whatever may be the right of the parties, it is impossible to suffer the defendant to amend his answer in the manner he desires, for it would be of dangerous consequence.

It is true, at law they will allow you to amend, but it is in matters of form only, here it is an extreme different thing, for it is an admission of facts, as, that thirteen hundred pounds advanced by the defendant's father in his life-time, was a full advancement.

And though, if the certainty of the sum appears, a child is not precluded from the residue of the orphanage share, if he will bring the sum before advanced into hotchpot, yet he may be bound by any agreement between him and his father, that this money so advanced should be in full, and bar him of the residue of his orphanage share.

It would be strange therefore, to strike out this admission, and deprive the plaintiff of the benefit of this evidence, when the defendant does not swear that he is surprised into this admission, or ill advised in setting it forth.

The party is not bound by an admission of a consequence in law, or a consequence in equity, for the court is to judge of the law.

I distinguish between an admission of a fact, and an admission of a consequence in law, or a consequence in equity; if it had been so, the party would not have been bound by it.

There are several admissions of parties where the defendant has been mistaken in his point of law, and yet shall not be bound by it, because the court is to judge of the law.

Though the jury make a wrong conclusion in a special verdict, the court will judge by the fact.

As in the case of a special verdict, if the jury make a wrong conclusion, the court is not bound, but will judge by the fact; *id.* as to a writ of error, where error in law is assigned, and the

(1) *Vide Wharton* v. *Wharton*, *ante* 2 vol. 294. *Paterson* v. *Slaughter*, *Amb.*

defen-

defendant comes in and admits the error, yet the court is not bound by the admission, but will determine according to their own judgment whether it is error in law. *Pearce v. Grove.*

Lord Hardwicke denied the motion.

Anon. *June* 27, 1747. Case 188.

[524]

AN account was now depending in the cause before a Master, the plaintiff offered to read, as evidence before the Master, the depositions in a former cause, wherein the plaintiff and the defendant were parties, which he refused to admit, unless an order of the court was obtained for that purpose; Mr. *Evans* moved now for such order, but *Lord Chancellor* denied it, because he would not put persons to unnecessary expence by such applications; and said, the reason why you cannot read such evidence at the hearing without an order is, that every cause before the court is an intire proceeding, and determined for the most part in one day, so that unless you have a previous order it is a fatal exception; but before a Master, parties go on *de die in diem*, and he has an opportunity of judging whether he ought to admit the depositions to be read, or if the Master should be mistaken, you may take exceptions, and therefore there is no occasion for the court to make an order in it.

The court will not make an order upon a master to admit depositions taken in a former cause between the same parties to be read, as it is putting parties to an unnecessary expence, the proper course being to take exceptions.

Haws versus *Haws*, *June* 26, 1747. Case 189.

ANDREW Haws, the testator's grandfather, being seised in fee of a moiety of the manor of *Down-Barns*, in *Middlesex*, devised this moiety and all other his manors in *Middlesex*, *unto his four children* William, Carlton, Andrew, *and* Thomas *Haws*, *their heirs and assigns*, *equally to be divided between them*, *share and share alike*, *as tenants in common*, *and not as joint-tenants*, *with the benefit of survivorship.*

1 Ves. 13. S. C. 1 Will. 165. S. C.

A. H. devise all his manors to his four children *W. C. A.* and *T.* their heirs and assigns, equally to be divided between them, share and share alike, as tenants in common, and not as joint tenants, *with the benefit of survivorship.* The court was of opinion, the testator meant, if any of his four children died before twenty-one, it should go to the survivor, having used the same words in the precedent clause relating to his personal estate, and given the benefit of survivorship there, if either died before twenty-one (1).

The principal question was, Whether by the devise to his four children they took as jointenants, or a tenancy in common generally, or with any, and what contingent limitation over as to their respective shares.

(1) *Vide Lord Bindon* v. *Earl of Suffolk*, 1 P. W. 96. *Barker* v. *Giles*, 2 P. W. 280. *Stones* v. *Phillips*, 1 *Eq. Ab.* 297. *Pl* 11. 1 P. W 97 *Ford* v. *Downs*, *ante* 2 vol. 304. *Mends* v. *M[illegible]*, *post* 619, 624. *S[illegible]* v *Heartly*, 1 *Ves.* 165. *Rye* v. *Hill*, 3 *Burr.* 1881. *Earl of Salisbury* v *Lambe*, *Amb.* 383, *French* v. *Estricke*, *ibid.* 656. *Parker* v. *Baynton*, 1 *Bro. Cha. Rep.* 115. *Armstrong* v. *Eldridge*, 3 *Bro. Cha Rep* 215.

LORD

Hawe v. Hawe.

This court leans against joint-tenancy, as it is an incovenient estate, and so do courts of law now, though they favoured them formerly.

LORD CHANCELLOR,

The general rules insisted on are true, for certainly joint-tenants are not favoured here, because they introduce inconvenient estates, and do not so well provide for families, therefore *this court leans against them, and so, I believe, do the courts of law now, though they favoured them formerly, and the ground upon which they went, was the multiplication of services under the old tenures, but the statute of 12 *Car.* 2. *c.* 24. *sect.* 1. has reduced the several sorts to socage tenure only.

[*525]

Where the words of a will are so inconsistent as that they cannot be reconciled, the court must reject those words that are least consistent with the intention of the testator.

Another general rule is, that where a man has made a devise in his will, with a great number of words that may seem to clash with one another, the court will put such a construction as may make them consistent; but if they are so inconsistent, as that they cannot stand or be reconciled together, the court must reject those words that are least consistent with the intention of the testator.

The words *equally to be divided* import a tenancy in common in a will, if there are no more words.

Here his Lordship recited the words in the clause; this is a devise in fee to all of them; *equally to be divided* imports a tenancy in common in a will, if there were no more words (1), but here are other expressions which make it still stronger, *as tenants in common, which are not as joint tenants*; the last words are *with benefit of survivorship*, and this creates the difficulty.

Doubtful and ambiguous words ought not to controul clear and certain expressions.

I am of opinion that these words are not so strong as to controul the precedent words, for to construe it otherwise, would be from doubtful and ambiguous words, to set aside clear and certain expressions.

On the other hand, to construe the words with benefit of survivorship, according to the construction of the plaintiff's counsel, as if he had said *without benefit of survivorship*, or not with survivorship, (though I will not say but it has been done), would be contrary to the meaning of the testator, upon the whole tenor of the will.

The next construction put upon it by the plaintiff's counsel was, that this refers to a benefit of survivorship to the survivors of the children, if one, or more, *died in the life time of the testator*.

But this is too nice a construction, for it is more natural to suppose that a man intends the children of his children should be provided for than not, and the court supposes a parent is taking care of the posterity of his children.

It is not probable to think he meant that the benefit of survivorship should mean *survivorship of himself*, for a testator very seldom provides for a contingency in his life-time, for when any happens, he may alter his will if he pleases.

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Not but if no other reasonable construction can be put upon these words, the court ought to resort to it, as in the case of Lord *Bindon* versus *Earl of Suffolk*, 1 *P. Wms.* 96. "Devise "of a debt to five grandchildren, share and share alike, equally

(1) So *Rigden* v *Vallier*, post, 733.

"to

HAWS v. HAWS.

"to be divided between them, and if any of them die, then "to the survivor, held to be tenants in common; for by the "words, *if any of them die, his share should go to the survivor*, "Lord *Cowper* said, it must be intended if any of them should "die *in the life-time of the testator*, for by that construction, "every word of the will would have its effect and operation."

There is in another part of the will a plain inference, that he meant a survivorship arising among one another, and not a survivorship in the life of the testator: it is in the precedent clause relating to the personal estate, where the same words are used, and the benefit of survivorship *given in case any of them died before* 21 (1).

This excludes the putting the unnatural construction before mentioned, and *verba relata inesse videntur*, and is just as if he had said, that if any of them died under 21, it should go to the survivor.

Then consider what effect it will have upon the construction on the real estates, the four children who are to take the personal, take too the real estate, and the same words in the same will, ought to have the same sense; he was here making a provision for the younger children, to take, indeed, as tenants in common, but with the benefit of survivorship; what benefit of survivorship could he intend, but the same as he intended in the survivorship of the testamentary part of his personal estate; I do not doubt but this was his real intention, as he was making a provision for younger children, and if one of them should die, did not intend any part of it should go away to his eldest son, which would lessen the provision that was clearly intended for the younger children; and therefore his Lordship decreed (2) accordingly.

The same words in the same will, though in a different clause, ought to have the same sense; and as the testator intended survivorship among his children in the personal, he must mean it also in the real estate.

(1) These words in Italics are not in the Register's book tho they were probably in the will.

(2) "That the share of *Carleton Hawes* "one of the younger children of the said "*Andrew Hawes* the elder in the real "estate devised by his will to his younger children did upon his the said *Carleton*'s death under the age of 21 years "without issue descend to the surviving "younger children." *Reg. Lib. A.* 1746. fol. 707.

Elliot versus *Collier*, *July* 1, 1747. Case 190.

S. C. 1 Wils. 168. S. C. 1 V. 1. 15.

THE bill was brought by the plaintiff, as the representative to a second husband of the daughter of a freeman of *London*, for her share of her father's customary estate.

Where a husband dies before he administers to his wife's personal estate, it shall not go to her next of kin, but to his representative (x).

The defendant insisted she was fully advanced in her father's life-time.

There was another question in the cause, Whether, the husband dying without administring to the personal estate the wife

(x) See *Lady Ashough's* case, 1 *P. W.* 382. *Humphrey* v. *Bullen*, ante 1 vol 458. *Bacon* v. *Bryant*, 11 *Vin Ab* 88. pl 25.

Elliot v. Collier.

had in her own right, it shall go to the next of kin of the wife, or to the representative of the husband,

Though the ecclesiastical courts are bound by act of parliament to grant the administration to the next of kin of the wife, yet that does not bind the right in this court, for the husband surviving the wife, her whole estate vested in him at the time of her death, and the whole property belonged to him.

Lord Chancellor,

This is a very clear case; the representative of the wife has no right to an account of her personal estate, and that point does not follow barely the legal right of administration, for though the ecclesiastical courts are bound by act of parliament to grant the administration to the next of kin of the wife, yet that does not bind the right in this court; for the husband surviving the wife, her whole estate vested in him at the time of her death, and no person could possibly be intitled to the rights of the wife but himself, so that her whole property belonged to him: there are several cases in which it has been held, that though the ecclesiastical court are bound to grant administration by 31 *Ed.* 3. *c.* 11. yet those persons have been looked upon in this court as mere trustees.

Had the wife survived the husband, such part only of her father's personal estate as had continued *choses in action*, would have survived to her.

Suppose the wife had survived the husband, only such part of the personal estate of her father as had continued *choses in action*, would have survived to her, for whatever he had reduced into possession, would have been the husband's.

This court makes an *administrator de bonis non* only a trustee for the next of kin, with respect to such part of a testator's personal estate as is undisposed of.

Upon the equity of the statute of distributions, this court makes an *administrator de bonis non* only a trustee for such part of the testator's personal estate as is undisposed of, for his next of kin, therefore I am of opinion the husband's representative is intitled to the wife's personal estate, and that it vested in the husband before administration was taken out.

Where a freeman of *London* has children, and no wife, the custom is, that one moiety belongs to them, and the other is the testamentary part.

The next question is, as to the custom of *London*; it is a certain rule, that where a freeman has children, and no wife, one moiety belongs to them, and the other is the testamentary part.

If one child is advanced in the father's lifetime, tho' not fully equal to the customary share, yet if the certainty does not appear, it is an advancement (1).

As certain too, that if one child is advanced in the lifetime of the father, though not fully equal to the customary share, yet if the certainty does not appear, then it is an advancement; and the principal reason I take to be, is, because it cannot be known what is to be brought into hotchpot.

A watch and wedding clothes no advancement.

A gold watch and wedding clothes are no advancement of a child (2).

(1) *Faulkner* v. *Watts*, *ante* 1 vol. 406 note 1.

(2) *Morris* v. *Burroughs*, *ante* 1 vol. 403 3 *P. Wms* 317. note [O] *Hume* v. *Edwards*, *ante* 452.

A fa-

A father's consent to the marriage is not sufficient to bar her, it must appear how much he has advanced her under his own hand.

ELLIOT v. COLLIER. The quantum of the advancement must appear, his consent is not sufficient to bar a child of her orphanage share.

An advancement must be by way of portion in marriage, or to set up in the world, and the things given here are only emoluments (1).

An advancement must be by way of portion in marriage.

Suppose the father had given her 50 *l.* in money, as he has left but one child more, and the orphanage share amounts to 2000 *l.* it would have been going a great way, to say even this would have been an advancement: consider the reason of the custom at the time of its first establishment, it was for the sake of trade; and though there have been some strict cases determined on the custom of *London*, yet those have been in the case of freemen's wives, and not upon advancement of children. *Lewen* versus *Lewen*, *Eq. Cas. Abr.* 159.

Tho' there have been some strict cases determined on the custom of *London*, these have been in regard to freemen's wives, and not upon the advancement of children.

It has been said next, that the maintenance allowed by the father to the daughter after marriage, is an advancement, and that the certainty of the maintenance does not appear.

The question is, Whether that can be considered as any advancement at all.

Now it has been determined, *alimony*, advanced by a father to a child, ought not to be considered as an advancement; in the case of *Edwards* versus *Freeman*, *Eq. Cas. Abr.* 249. "For the "court held, as to the 80 *l. per ann.* maintenance, provided for "the daughter by the settlement, that it should not be brought "into hotchpot, being only for the education and main-"tenance of the daughter, of which the parents were the best "judges:" that indeed was upon the statute of distributions of intestates' estates, but goes upon the same reason as if it had been a question on the advancement under the custom.

Alimony advanced by a father to a child ought not to be considered as an advancement.

The daughter was just of age when she married; the question is, Whether the maintenance should be considered as a debt from the daughter to the personal estate of her father?

What the daughter of a freeman received from him after her marriage, for maintenance, shall be considered as a debt due from her to the personal estate of the father.

It is reasonable the representative of the daughter should make some allowance for the maintenance, as she has so much more out of the personal estate than her sister by this means; and I do not know whether this alimony might not be considered as an advancement *pro tanto*, being after her marriage, but, however, it must be brought in as a debt to the father's estate, and as she thought proper to dispute his will, I think what she received after her marriage for maintenance, should be considered as a debt due from her to the personal estate of the father. [529]

Lord Chancellor declared, "that *Elizabeth Filmore*, one of "the two daughters of *Boover*, who was a freeman of the city "of *London*, on the evidence in the cause, ought not to be

(1) *Heath* v. *Barber*, *ante* 213 *Hume* v. *Edwards ante* 450 *S. P.*

"taken

Elliot v. Collier.

"taken to be advanced by her father in his life-time; and "that the plaintiff, as executor of her husband, who survived "her, is intitled to her customary share of her father's per- "sonal estate: and ordered, that *Boover*'s personal estate, after "payment of his debts and funeral expences, be divided into "moieties, one moiety whereof is the orphanage part of the "testator, he having died without leaving any wife, the other "is his testamentary part, and subject to the disposition of "his will; and as to the orphanage part, ordered, that the "same be divided into two equal shares; and declared that one "share thereof belongs to the plaintiff, as executor of the second "husband of *Elizabeth*; and his Lordship also declared, that "the defendant, as executor of the testator *Boover*, ought to "be considered as a creditor of *Elizabeth*, for the value of "her maintenance, which was furnished by *Boover* to *Elizabeth*, "after the death of her first husband, and ordered the Master "to inquire how much by the year *Boover* deserved in respect "of such maintenance, and that the same be deducted out of so "much as shall be coming to the plaintiff for the share of *Eliza-* "*beth*, and be answered as a debt to *Boover*'s personal estate; "and it being admitted that 60 *l.* had been paid to the plain- "tiff's testator before his death, his Lordship ordered that so "much should be allowed, as a payment of the customary share "of *Elizabeth*"(1).

(1) *Reg Lib* A. 1746. fol 563.

Case 191. *Tittenson* versus *Peat*, *July* 1, 1747.

THE defendant pleaded an award.

Lord Chancellor,

An award being made by judges of the parties' own chusing is final unless there is collusion or gross misbehaviour in the arbitrators.

The only ground to impeach an award is collusion, or gross misbehaviour in arbitrators (1); for, otherwise, being made by the judges of the parties' own chusing (2), it is final, and binding upon all the parties, or no persons would ever accept of being arbitrators.

A defendant is not obliged to set out the account between him and the plaintiff, after an award in his favour relating to that account, for a plea of an award is good not only to the merits, but to the discovery.

A plea of an award is not only good to the merits of the case, but to the discovery; for a defendant to the bill is not obliged to set out the whole account between him and the plaintiff, after

(1) See *Pit* v. *Dawkra*, cited in *Earle* v. *Stocker*, 2 *Vern* 251. *Smith* v. *Coryton*, *ibid* *Hanson* v. *Mitchel*, *ibid* 485. *Bitton* v. *Knight*, *ibid*. 514. *Metcalfe* v. *Ives*, *ante* 1 vol. 64 *Anon*. post, 644. *Chicot* v. *Lequesne*, 2 *Ves*. 315.

(2) See *Medcalfe* v. *Ives*, *ante* 1 vol. 64.

an

an award in his favour, in relation to that very account, for that is conclusive to all the parties, till an error is shewn in taking the account, or partiality and improper behaviour in the arbitrators; and if any particular error is pretended, the plaintiff ought to charge it with all its circumstances, nor is he precluded from proving it now if he has evidence that will amount to it.

TITTENSON v. PEAT.

One objection has been made, that the arbitrators did not give sufficient notice of the time they intended to meet, or the particular place at which they were to meet, they are not bound to do it, and therefore no objection of that kind is material.

Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where.

Lord *Hardwicke* allowed the plea.

Anon. *July* 1, 1747. Case 192.

LORD CHANCELLOR,

THE court cannot let a demurrer stand for an answer, because it is a mute thing.

The court cannot let a demurrer stand for an answer.

Bash versus *Dalway*, *July* 6, 1747. Case 193.

THE trust term created upon the marriage of the defendant's father and mother was as follows:

By settlement on the marriage of *H. A.* with *J. C.* in case there was no issue male, and there should be daughters living at the death of the father, who should attain 21, or be married, then such daughters should have 2000 *l.* a-piece; there were no sons, but only three daughters; the defendant who was one, married *A. D.* and previous to his marriage, covenanted to assign with his wife's consent 500 *l.* to trustees, in trust after the death of *A. D.* and the defendant, to pay it amongst the children of the bodies of the defendant and *A. D.* and that he should after the marriage assign to the trustees all the money and securities for it then due and belonging to the defendant. *H. A.* died in 17,4. *A. D.* in 1745, intestate, to whom the defendant administered and received the 2000 *l.* The children, who are a son and daughter, have a right to the portion, and decreed to be secured for their benefit.

That in case there should be no issue male of *Henry Andrews* by *Jane Cole*, and if there should be issue between them one or more daughter or daughters *living at the death of the father, who should attain twenty one or be married*, then such daughter or daughters should have a portion or portions of two thousand pounds a-piece.

There were no sons of the marriage, but three daughters, of which the defendant was one, and previous to her marriage with *Alexander Dalway*, there was a covenant on his part, which recited, that *Elizabeth Uthwite* was indebted to the defendant *Margaret Andrews*, the daughter of *Henry Andrews* by *Jane Cole*, in five hundred pounds on bond, and that she, with the consent of the said *Alexander Dalway*, did assign to two trustees the five hundred pounds, in trust as to the interest for the life of the husband, and after his death to receive it for her life, and after both the husband and wife's death, to pay the five hundred pounds and interest due amongst all and every the child [531]

BASH v. DALWAY.

child and children of the bodies *then living of Margaret* and *Alexander Dalway*, and in default of ſuch child or children, then to pay the five hundred pounds to the executors of the ſurvivor of the father and mother, and that the huſband ſhould after the marriage, on the requeſt of the truſtees, grant and aſſign to the truſtees all and every the ſum and ſums of money, and ſecurities for the ſame, then due and owing, and *belonging to Margaret Andrews*, from any perſon or perſons, and which *Margaret Andrews* was intitled unto in any reſpect whatſoever.

Henry Andrews died in 1744.

In 1745, Mr. *Dalway* died inteſtate, the defendant *Margaret* adminiſtered, and receives the two thouſand pounds.

The plaintiff *Baſh*, as *prochein amy* to the children of the defendant, who are one ſon and one daughter, brought his bill to have the two thouſand pounds ſecured for the benefit of the children.

LORD CHANCELLOR,

I am of opinion the plaintiffs, the children, have a right to the portion.

The firſt queſtion is, whether the portion of two thouſand pounds under the father's marriage ſettlement, at the time of the defendant's marriage, was a contingent portion?

Secondly, If it has happened, whether the wife is bound by the covenant of the huſband only under the articles made on her own marriage?

Though under articles the real eſtate was in the mother's power and veſted in her in tail, yet in this court is to be carried into ſtrict ſettlement to the wife for life, to the firſt, &c. ſons in tail, and in default of iſſue male to daughters.

The precedent part of the articles include a ſmall part of the real eſtate, the now plaintiffs being heirs of the body, that eſtate certainly is in the power of the mother in point of law, and veſts in the mother in tail; but in this court being under articles is to be carried into ſtrict ſettlement to the wife for life, to the firſt and every other ſon in tail, and in default of iſſue male to daughters.

[532] *Vide* the truſts as to the 500 *l. and after both the huſband and wife's deaths, to pay the 500 l. and intereſt due amongſt all and every the child and children of the bodies then living of Margaret and Alexander Dalway.*

That is, after the death of father and mother, for the benefit of the children of the marriage, ſuch as ſhould be ſurviving at the death of the father.

Then follows the laſt clauſe, that the huſband ſhould after the marriage, &c. *vide the words.*

It has been ſaid on the part of the defendant the mother, it is not ſufficient to intitle the plaintiffs to the two thouſand pounds, for it was for ſuch children *as ſhould be living at the death of the father.* That it reſted in contingency, whether they would ſurvive the father; and in ſtrictneſs of law it was not due and owing to *Sarah Andrews* in the life-time of her father.

But

BASH v. DALWAY.

But take it abstracted from the sense of *due and owing*, and it was *belonging* to her, for it was a natural prospect that she should survive the father, and if the word *belonging* means any thing exclusive from the words *due and owing*, it does mean belonging to her after the husband's death.

There are strong words which follow, *viz. and which Margaret Andrews was intitled to in any respect whatsoever.*

Had any body asked what portion has the daughter under *Henry Andrews's* settlement? the answer would have been, two thousand pounds on the death of the father; then it is in the nature of a security for the daughter by being vested in the trustees to wait the contingency, not barely a condition or a right where nothing at all vested; but here was a term for years in trustees, and *quoad* this trust they were trustees for her, and they might have been guilty of a breach of trust, so that she had a right at the time of the marriage.

She married an officer who had nothing, and it would indeed have been very extraordinary she should, at the time she was providing and taking care for herself, overlook this, when she might have been intitled, on both her sisters dying, to the whole six thousand pounds.

I am of opinion on the generality of the words of the covenant this sum was included.

[533]

A wife is bound by the husband's covenant only under articles made on her marriage.

Secondly, If the contingency has happened, whether the wife is bound by the covenant of the husband only under the articles made on her own marriage.

It has been insisted on the part of the defendant, that this is the covenant of the husband only, and therefore his representatives alone are bound.

I cannot say but there might have been an event, which would have given it to the wife, *viz.* if her husband had died in the life-time of the father.

But the death of the father happening in the life-time of the defendant's husband alters the case; I am not obliged to give any opinion as the husband has not assigned this contingency of the wife's, but I am rather inclined to think the husband would not have had a right to assign it.

Frequently determined that a husband may assign a wife's *chose in action* for a valuable consideration.

As to the case of *Theobald* versus *Duffoy*, *M. T.* 11 *Geo. Mod. Cas. in Law and Eq.* 2 *Part* 101, it turned on the joining of the wife, by the consent of her friends, and in an assignment of a term to a fair purchaser; but it has been frequently determined, that a husband may assign a wife's *chose in action* for a valuable consideration (1); but what does that turn upon? Why, the husband's right to sell.

The husband here survived the father, so that he had a right to call upon the representatives of the father, or the trustees, to raise it (2).

Could the wife have prevented him from getting the money, unless she had brought a bill by her *prochein amy* for her settlement,

(1) *Vide Bates* v. *Dandy*, *ante* 2 vol. 208.

(2) *Vide Hawkins* v. *Obyn*, *ante* 2 vol. 549.

Bath v. Dalway.

ment, and even then it could not have been for her own benefit only, for the children must likewise have had it settled on them, for the court would not have decreed a partial performance of covenants, but the whole.

I am of opinion the children too had a right in the life-time of their father, to have brought a bill by a *prochein amy* to have their interest secured.

The husband's death makes no alteration, but must stand in the same right as it did at the death of the wife's father, for the interests of the wife, husband, and children were then fixed.

The death of the husband makes no alteration, it must stand just in the same right as it did at the death of the wife's father, for the interests of the wife, husband, and children, were fixed, and which ever had brought a bill, it must have been settled to those uses, and *the rather as there is real estate*.

[524]

What is covenanted to be done, is in this court considered as done.

The question here truly depends upon this general rule of the court, that what is covenanted to be done, is considered as actually done, and therefore as the right had accrued to the husband in his life-time, what is prayed by the plaintiffs, his children, is concomitant to that right which vested in their father.

Lord *Hardwicke* decreed the two thousand pounds should be secured for the benefit of the children (1).

(1) *Reg. Lib.* A. 1746. fol. 671.

Case 194. *Elins* versus *Dormer*, *July* 20, 1747.

A grant from Queen *Mary* of *decimas bladorum & fœni & omnes alias decimas*, these general words are not sufficient to bar the rector of his common right of tithes, unless expresly stated what was the right of the crown.

Lord Chancellor,

THE bill was brought for tithes in kind of hay of a moiety of the manor of *Shipton*, but comes in an imperfect manner before the court.

The plaintiff as rector is intitled to all tithes (1), unless there is some bar, as a *modus*, composition, &c.

The question here is as to a moiety of the privy tithes of the demesnes of a manor, and the tithe hay, whether the rector is intitled in point of pernancy to the whole, or the defendant is intitled to this moiety as well as to the tithes of corn and grain under a grant from the crown, the first year of Queen *Mary*, in which were these general words, *decimas bladorum fœni & omnes alias decimas*.

I do not think any stress can be laid on these general words, and take them in their utmost extent, are not sufficient to bar the rector of his common right, unless it had been expresly stated what was the right of the crown; and in making out the

(1) *Carte* v. *Ball*, *ante* 499.

grant, the drawer might probably, at the request of the grantor, put in these general words. ERYMS v. DORMER.

There is no pretence of payment of the privy tithes to the lord of the manor. I am of opinion these general words are by no means sufficient to shew a right in the defendant against the rector.

The next question is as to the two *modusses*.

The first objection was, as to the manner of introducing them in the cause, for that in respect to the cross bill they are not set out with any certainty, and to be sure they are not, and therefore the cross bill must be dismissed: but a different consideration arises upon the original bill, notwithstanding the particular *modusses* are not mentioned in the bill, nor particularly pleaded by the answer; yet as the plaintiff's own witnesses shew [535] a reasonable ground for a *modus*, it would be going too far to say that an account of tithes should be decreed, where even upon the plaintiff's evidence it appears there is a *modus*.

I am of opinion therefore the court is bound to take notice of the two *modusses*, the ten shillings for hay, and five pounds for the privy tithes of the demesne lands.

As to the first, it is mentioned to be a *modus in decimando* in the receipt for it from the parson, but the receipt for the five pounds calls it a composition.

It has been said, that the *modusses* are too rank, and that the ten shillings for hay particularly are so, because the *modus* for the tithes of corn is but three and thirty shillings.

No argument at all is to be collected from thence, because less might be in tillage at that time than there is now.

The objection is stronger as to the five pounds for the privy tithes of the demesnes; undoubtedly it is a pretty large sum, and it has been insisted the whole value of the manor is but fifteen pounds, as appears from an ancient survey in *Henry* the 8th's time, where it is called *firma* of *Shipton*, which implies a rent reserved.

But I can no more infer from thence, that this was the value of the rack-rents of the manor in *Henry* the 8th's time, than I can at present the real value of a bishop's manor from the rent reserved in a lease of it.

In a case that came by appeal to the House of Lords in Lord *Talbot*'s time relating to the parish of *Chedingfold* in the county of *Surrey*, the Lords reversed a decree of the court of Exchequer for being too hasty in rejecting a *modus* as too rank, and said, it was taking too much upon them to determine it to be no *modus* upon such kind of evidence which was not conclusive evidence against a *modus*, and directed an issue to try it.

The House of Lords reversed a decree of the Exchequer for being too hasty in rejecting a *modus* as too rank, it being too much for that court to determine it to be no *modus*, where the evidence was not conclusive against it, but presumptive only.

Another objection was, that the five pounds is no *modus* at all, for in the receipt from the parson it is mentioned to be an ancient composition.

 I do

[illegible] v. Dormer.

An ancient composition is synonymous with a modus, unless something be shewn that breaks in upon its immemorialness.

I do not know the absolute distinction between an ancient composition and a *modus*; there may be a difference between a composition that is not beyond the memory of man and a *modus*, but unless something be shewn that breaks in upon the immemorialness of it, it is synonymous with the *modus*.

A real composition is where an agreement is made with a parson or vicar, with the patron and ordinary's consent, that such lands shall be discharged from the payment of tithes in specie, on account of a recompence made to the parson or vicar out of other lands.

There is indeed a difference between *a real composition* and a *modus*, for a real composition is when an agreement is made with a parson or vicar, with the consent of the patron and ordinary, that such lands for the future shall be discharged from the payment of tithes in specie, by reason of a recompence made to the parson or vicar for them out of other lands; but a *modus* is nothing more than an ancient composition between a lord of a manor and the owners of the land in a parish and rector, which gains strength by time.

Were there is no objection in point of law to moduses, nor tithes in kind ever received within the memory of man the court will not decree an account of tithes.

I am of opinion here is a considerable foundation laid before the court for the two *moduses*, the one of ten shillings, and the other of five pounds, and therefore the court cannot decree an account of tithes, where there is no objection in point of law against them, nor any pretence there has ever been tithes in kind received within the memory of man, and therefore issues must be directed to try these two sums.

The plaintiff being in court, and declining to try the *modus* of ten shillings for tithe hay of the manor, and five pounds for privy tithes of the demesne lands, his Lordship decreed an account of what was due for those annual payments.

Case 195. *Townsend* versus *Lowfield*, *July* 24, 1747.

S. C. 1 Ves. 35. Where there is no positive proof of fraud, circumstances of suspicion are not sufficient for the court to ground a decree upon; all they can do in a matter of account is to give the plaintiff leave to surcharge and falsify.

LORD CHANCELLOR,

THERE had been a former cause in which the defendant was plaintiff and the plaintiff defendant, and a decree for an account; and though this is not a bill of review, yet, as it is a bill in aid of an account, it is not improper.

The bill charges fraud in not actually and *bonâ fide* advancing to the plaintiff, or other persons for his use, the sums defendant now claims before the Master, and prays among other things the court will direct the defendant *Lowfield* to be examined upon interrogatories, and to be allowed no sum but what he shall produce receipts for, or proved by witnesses who were present at the time they were advanced.

No actual fraud has been proved by the plaintiff's witnesses on the defendant, and circumstances of suspicion are not sufficient

cient for this court to ground a decree upon; and as to what is prayed by the bill, the court never gives such directions, unless gross fraud is actually proved upon the defendant, as was the case of Sir *Oliver Ashcomb* versus *Greenaway*. TOWNSEND v. LOWFIELD.

The House of Lords too reversed the decree in *Johnson* versus *Johnson*, which came originally before Lord *Lechmere* in the dutchy court for this very reason; the bill in that cause was brought by the representative of the mortgagor to redeem a mortgage, and the defendant by his answer insisted on payment of 230 *l.* the principal sum of the mortgage, and 10 *l.* more indorsed on the mortgage deed, as *bona fide* lent, and to have an allowance for money in repairs, and also other allowances. On the 29th of *November* 1725, Lord *Lechmere* decreed that the plaintiff should redeem on payment of such principal money and interest, as should be proved by the defendant to have been actually and really lent and paid by him to the mortgagor, for discovery whereof the defendant was to be examined upon interrogatories, *whether any and what sum and sums were at any time, and when, where, and in whose presence actually and really lent and paid by the defendant, or on his account, to or for the account of the mortgagor.*

There were proofs in the cause, that the greatest part of the money was paid by the defendant to the mortgagor at the time the mortgage deed was executed, and that the mortgagor at the time he signed the deed declared he had received the whole 230 *l.* therefore the appellant insisted the respondent should have been let into redemption on the usual terms, and that the appellant ought not to have been decreed to make any other proof of the actual payment of the consideration money; and that it was still harder upon the appellant, as the mortgagor is dead, and the appellant deprived of having any discovery, by the examination of him upon oath, of the money advanced, and prayed the decree might be rectified in this particular.

It came before the House of Lords on the 18th of *March* 1727, on an appeal of the defendant, and the decree below was reversed because the mortgagor was dead, and the appellant had lost the benefit of his examination, and because *no actual fraud* had been proved on him.

Here one *Haughton* is dead, to whom the defendant paid sums for and on account of the plaintiff Mr. *Townsend*, and therefore the defendant cannot have the benefit of his examination, nor is there in this case any positive proof of fraud; therefore I shall decree only that the plaintiff be at liberty to surcharge and falsify.

Case 196. *Edwards* versus *Lewis*, *July* 27, 1747.

In the case of leases from colleges and ecclesiastical bodies if the lessee in the new takes in the right of him who was the owner of the old, he must take subject to all the equity to which the original lease was liable.

DAVID *Edwards* by his will gave his real estate to his wife for life, remainder to the plaintiff, and after devising the personal estate in the first place, for payment of his debts, he bequeathed the residue to his wife, who, on his death, entered upon a leasehold estate under Queen's college, and then intermarries with the defendant, who, after her death, takes out administration *de bonis non* to the first testator, but finding the outgoings of the leasehold exceeded the profits, and being of no service but to the plaintiff, his freehold lands being intermixed with the leasehold, neglected to apply for the renewal, but tacitly consented the plaintiff should renew, who accordingly gets a new lease from the college, the old one being suffered to run out.

The question here is, supposing the rest of the personal estate should fall short to pay the testator's debts, whether the plaintiff will be liable to pay those debts by virtue of his being in possession of these leasehold premisses.

LORD CHANCELLOR,

I am inclined to be of opinion, that if the personal estate of the testator falls short, the leasehold estate in the hands of the plaintiff is subject to pay the creditors the residue of their debts, or, otherwise, by this neglect of the administrator, or by collusion between him and the plaintiff, the creditors might be defeated of their just debts; but as it is probable in taking the account of the testator's personal estate, there may be sufficient to pay the testator's debts, without having recourse to the leasehold, I shall not give an absolute opinion, but only observe in general, that in cases of leases from colleges and ecclesiastical bodies, there is nothing the court has more adhered to, than if the tenant, who in a constant course of letting is intitled to a college lease, or any person claiming from that tenant, apply, either before it expires, to renew, or after it is actually expired, and surrenders the old lease for that purpose; yet, whether the new lease is granted to the same person, or any other, if the lessee in the new takes in the right of him who was the owner of the old lease, he must take subject to all the equity to which the original lessee was liable (1).

Lord Chancellor "ordered an account to be taken of the testator's personal estate, and reserved the consideration how far the renewed lease of the lands held of Queen's college in *Cambridge*, is liable to be applied towards satisfaction of the testator's debts and legacies, till after it shall be seen whether the funds before mentioned are sufficient to pay his debts and legacies."

(1) See the cases cited in *Pierson* v. *Shore*, ante 1 vol. 480.

Drakeford versus *Wilks and others*, *July* 28, 1747. Case 197.

If a legatee promises a testator that, in consideration of a disposition in favour of her, she will do an act in favour of a third person, she who undertook to do the act must perform (1).

MRS. *Drakeford*, an intimate friend of the plaintiff, had made a will, and thereby devised a bond of 360 *l.* and upwards to the plaintiff; the testatrix was afterwards induced to make a new will, and gave this bond to Mrs. *Ann Wilks*, and made her executrix, but obliged her to promise that she would, after her own death, give it to the plaintiff.

The testatrix died, and *Ann Wilks* proved her will, and about two months after the death of the testatrix, made a deed of gift of the bond to the plaintiff, to take place after her death, and frequently declared, that she would not cheat the plaintiff, and that she did it in regard to the promise she made the testatrix.

Upon the death of Mrs. *Ann Wilks*, the bond came into the hands of the obligor, who was her brother, and representative, and upon his refusing to pay it, the plaintiff brought her bill, to compel the payment of the bond, and offered to read evidence to establish the fact, but it was insisted by the defendant's counsel this was to give parol proof to overturn a written will, and that the bond, by the will of Mrs. *Drakeford*, had been given absolutely to *Ann Wilks*, who was made executrix also, and that it was within the mischief the statute of frauds and perjuries intended to prevent.

The court over-ruled the objection; and the fact, with all its circumstances, was very fully proved.

LORD CHANCELLOR,

The first question is, whether there is any foundation to relieve the plaintiff on the trust and confidence set up by the bill.

The second question is, whether the court will assist in the case of a voluntary deed.

I will consider the last question first, in order to remove it out of the way.

The defendant's counsel have made two objections.

First, supposing it stood abstracted from weakness and infirmity in *Ann Wilks*, it is a mere voluntary deed, and the court will not assist the plaintiff to carry it into execution. [540]

A person may as well make a disposition by deed to take place after her death as by will, and such a deed has been decreed to be good in several instances, as against persons standing in representation to the donor, otherwise as against creditors.

This is of no weight, because against any person who stands before the court merely as the representative of Mrs. *Wilks*, it is a good disposition, for a person may as well make a disposi-

(1) So *Thynn* v. *Thynn*, 1 *Vern*. 296. S. C. *Sed vide Whitton* v. *Russell*, *ante* vol. 448. *Reech* v. *Kennegal*, 1 *Ves*. 123. *Amb*. 67.

DRAKEFORD v. WILKS. tion by deed to take place after her death (1), as by will: this court have in several instances decreed such a deed to be good, as against persons standing only in representation, to the donor, as being volunteers also, but would not be good against creditors.

The second objection was, Insanity in Mrs. *Ann Wilks*.

No evidence has been laid before me of actual imposition, circumvention, or fraud, and the deed of gift appears to be an act consistent with every other act she has done.

It was insisted, the preparing the draft of the deed to give it in the life-time of Mrs. *Wilks*, instead of after her death, is an evidence of imposition.

But it appears clearly to be the mistake and ignorance of the drawer, for it was altered immediately, and submitted to, but though there should be no fraud, yet if Mrs. *Ann Wilks* was incapable of making any disposition at all, it is void.

If it had rested here, and this had been the whole of the case, I should have sent it to be tried on the insanity, notwithstanding she does not appear on the evidence to be insane without lucid intervals; but I will not send it to trial, because the first point is with the plaintiff, which puts an end to the second question.

It has been truly said by Mr. *Wilbraham*, it is dangerous to set up parol trusts of personal estate, as well as real estate since the statute; and that the court will not suffer parol declarations to be set up in opposition to the will.

But if there is a declaration and undertaking by a legatee to do an act, in consideration of the testator's devising to that legatee, I know no case where the court has not decreed it, whether such an undertaking was before the will has been made, or after.

The case of *Thynn* versus *Thynn*, in 1 *Vern.* 296. and *Jones* versus *Nabbs*, *Pasch.* 1718. *Eq. Cas Abr.* 405. and *Kinsman* versus *Kinsman*, 5 *Q. Ann*, mentioned in *Jones* and *Nabbs*, depended upon the undertaking and promise of the person who was to receive benefit by the will.

This is not setting up any thing in opposition to the will, but taking care that what has been undertaken shall have its effect: a will being ambulatory, if the testatrix has a conversation with a legatee, and the legatee promises that, in consideration of the testator's disposition in favour of her, she
[541] will do an act in favour of a third person, and the testatrix lets the will stand, it is very proper the person who undertook to do the act should perform, because, I must take it, if Mrs. *Ann Wilks* had not so promised, the testatrix would have altered her will.

Therefore I am of opinion, that such an undertaking by an executor, or residuary legatee, either before or after the will is made, ought to have its effect.

(1) So *Ramsden* v. *Jackson*, *ante* 1 vol. 292.

The

The next question is, Whether this has been sufficiently proved? DRAKEFORD v. WILKS.

I think it has very clearly; for even some time after the will had been made, Mrs. *Ann Wilks* declared, she would not defraud the plaintiff, and there is a full evidence likewise of the undertaking, by which she bound her own conscience.

An account must be taken of the principal and interest due on the bond, and with costs, because the defendant is the debtor on the bond; there is no occasion for a circuity to decree the bond to be delivered up, in order to have a suit at law for it, because, as the defendant *Wilks* is the debtor, I can decree a payment of the debt; and his Lordship did decree accordingly (1).

(1) *Reg. Lib.* A. 1746. fol. 595.

Caverley versus *Dudley and Bisco*, *July* 29, 1747. Case 198.

L. C. H. gave the residue of her estate in trust to pay the produce thereof to *Lady Dudley* for life, for her separate use, and after her death, to her children, and appointed *B.* executor. Lady *Dudley* wanting money, took up 120 *l.* of *C.* and granted him an annuity of [illegible] *l.* during her life, and directed *B.* to pay himself out of the produce of the residue of *L. C. H.*'s estate [illegible] quarterly payments. *Lady Dudley might contract to raise money by loan, but not by annuity, as it is* [illegible] *large an anticipation, and therefore she was allowed to redeem the annuity from the beginning, though* [illegible] *irredeemable* (1).

LADY *Catharine Howard* by her will, dated the 7th of *July*, 1727, gave all the rest and residue of her estate, real and personal, to Mr. *Bisco*, in trust to pay the produce thereof to the defendant Lady *Dudley* for life, for her separate use, exclusive of her husband; and after her daughter's death, gave such residue to the child or children of her daughter, and made the defendant *Bisco* executor.

The defendant Lady *Dudley* has received yearly 300 *l.* or thereabouts, from the defendant *Bisco*, in part of the produce of the residue of the testatrix's estate, but, wanting money, applied to the plaintiff, and offered to sell him an annuity during her life, at six years purchase: the plaintiff consented to it and agreed to purchase an annuity of 20 *l.* during the defendant's life, for 120 *l.* and by deed of appointment, dated the 20th of *December*, 1743, in consideration of 120 *l.* paid by the plaintiff to Lady *Dudley*, she granted an annuity of 20 *l.* to the plaintiff during the defendant's life, and directed *Bisco* to pay the same out of the produce of the residue of the estate of Lady *Howard*, by quarterly payments. [542]

The defendant *Bisco*, the trustee, refuses to pay the arrears of the annuity in this manner, insisting that the produce of Lady *Catharine Howard*'s estate is by will to be paid into the hands of Lady *Dudley*, and no other person.

The bill was brought in 1745, for an account of the testator's personal estate, and to be paid the arrears of the annuity

(1) See *Lawley* v. *Hooper*, *ante* 278. and the cases referred to there.

Caverley v. Dudley.

and growing interest, and that the future payments may be secured, and the defendant *Bisco* be restrained from paying any further sums of money to Lady *Dudley*.

Lord Chancellor,

I am of opinion it was not the intention of the testatrix that Lady *Dudley* should anticipate the produce of her estate by raising money upon it, and words should have been thrown in to restrain her from doing it, but as there are no such words in the will, she might contract for raising a sum of money by way of loan, but not as by way of annuity for her own life, as it is too large an anticipation; and therefore directed an account to be taken of Lady *Catharine Howard*'s estate, and out of the produce, give the defendant Lady *Dudley* leave to redeem the annuity from the beginning, though made irredeemable; and that, from the time of filing the bill, the annuity should cease (1); and that the payments already made of the annuity should be applied in payment of the interest, in the first place, and afterwards in sinking the principal; and the residue of the principal his Lordship directed to be paid out of the produce of the testatrix's estate (2).

(1) Not so in the register's book. (2) *Reg. L b.* A. 1746. fol 491.

Case 199. *Baker* versus *Hart*, *July* 31, 17[illegible]7.

S. C. 1 Vef. 28. The court, for the more solemn determination, in some cases direct a second trial, without setting aside the first verdict, for otherwise the defendant would lose the benefit of urging the first verdict in his favour.

THE cause was heard before Lord Chancellor in *May* 1746, and issues were then directed: it came on now upon the equity reserved, and upon an application for a new trial.

[543] Lord Chancellor,

Upon the second issue before Lord Chief Justice *Wills*, the jury found that *William Baker*, the father of the plaintiff, was not the heir of admiral *Hosier*; but it has been certified to me by the Chief Justice, that the finding of the jury depended upon the verdict given on the first issue.

The application now is, not to set aside the verdict, but for another trial (1).

Where it is a matter of inheritance (2), the court, without setting aside the first verdict, for the more solemn determination, in some cases direct a second trial, and if the court direct such trial without setting aside the former verdict, then the first may be given in evidence, and will have its weight with the jury, and therefore it is a very material difference to the parties, because if I was to direct a new trial, on my setting aside the first verdict, the

(1) *Vide Attorney General* v. *Montgomery*, 2 Vol. 378. (2) *Vide Stace* v. *Mabbet*, 2 *Vef.* 554.

defendant

defendant would lose the benefit of urging the first verdict in his favour at another trial.

In many cases, where it is a matter of inheritance, and not actually conclusive, the court have not directed a new trial, but where the inheritance will be absolutely bound, the court has granted a new trial.

In the present case, it is insisted, the inheritance will be bound, and said, in answer to that, the plaintiff may try it over again in ejectment; if so, where is the prejudice to the defendant, if the court should direct it to be tried again; for the leaving it to the plaintiff to bring an ejectment, will not quiet the question, because the defendant will be intitled to bring a bill here for a perpetual injunction.

In the case of *Atterley* versus *Vernon*, Lord Chancellor *King* granted an injunction, and at the hearing of the cause made it perpetual; the court considering the fee-farm rents devised by the will of Mr. *Vernon*, the chancery counsel, as part of the trust estate, he decreed accordingly, and it was upon this ground the court granted a perpetual injunction, because trusts are the proper jurisdiction of this court, and it would be nipping up the heels of their jurisdiction, if the parties were suffered to proceed at law, and by that means overturn the decree of this court.

In the case upon Sir *Thomas Colby*'s will, the court had decreed a partition of the lands, &c. so that bringing an ejectment there was equally in the consequence defeating the decree of this court. [544]

If the plaintiff should bring an ejectment, and should succeed in it, though a direction has been given here for a receiver, and to account and pay the profits, he might also bring an action for those very mesne profits, &c.

Here it was a question of legitimacy, but then it was a legitimacy set up after the death of the father, and no pretence of cohabitation, and all the facts speaking contrary to cohabitation, and to a marriage, for she suffered herself to be arrested in the name of *Pritchard*, lay in a gaol for some time, and was cleared at last by the insolvent debtors' act; this circumstance, though not conclusive, yet is material against the marriage; the daughter likewise was placed out by the parish of St. *Giles*, as a bastard child, and after being used by a father in this manner, it is very extraordinary if she had really been legitimate, that she did not compel the father to maintain her.

This question of legitimacy is very different from that, where there had been a cohabitation, as was the case of *Stapleton* versus *Stapleton* (1), and no doubt at all in that case but there had been a marriage, the only question was, as to the time, Whether they were married before the birth of the eldest son?

The verdict obtained in a former trial before Lord Chief Justice *Eyres*, was given in evidence upon this trial before Lord Chief Justice *Wills*, who certifies it had considerable weight

(1) *Ante* 1 vol. 2. S. C.

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with the jury, and if there is any thing that impeaches the evidence, on which the first verdict was given, it will be very material, for the verdict before Lord Chief Justice *Eyres* turned on a clergyman's evidence, one *Phillips*, who swore he christened the child as the child of Admiral *Hosier* and his wife, but on his death-bed confessed, in great agonies, that he was suborned to give this evidence, on the defendant's mother giving him a bond of 100*l.* to swear this fact.

Where *a verdict* is given in evidence, it is necessary for the person who gives it in evidence to shew on what title it was obtained; and on the other side, they are at liberty to shew on what kind of proof it was given.

Where a guardian has been guilty of ill practice in the prosecution of a suit, to obtain a verdict, though that was not the act of the infant herself, yet that male practice may be given in evidence.

The defendant Mrs. *Hart* was, at the time of the trial, before Lord Chief Justice *Eyres*, an infant, but if it is shewn that the mother acted as guardian for her, and was guilty of ill practice * in the prosecution of the suit, to obtain the verdict, though it was not the act of the infant herself, that male practice may be given in evidence, or otherwise such verdict may stand unalterable, and not liable to be impeached, and mankind would be in a very bad situation.

[*545]

But this was not the case, for the defendant *Hart* was married at the time, and her husband, as seised in her right, prosecuted the suit, and was a co-obligor in the bond to *Phillips*, as a reward to him for swearing in the cause.

If the circumstance of *Phillips*'s perjury had appeared to the court of Common Plea , it must have had great weight, the defendant's husband being seised in her right when that ejectment was brought, and being guilty of male practice, this might certainly have been given in evidence.

This takes off the force of the objection, that there are two concurrent verdicts for the defendant.

Another objection raised for the plaintiff was, that they were not permitted to give in evidence the deposition of one *Woolnoth*.

If there was a difference in the spelling of *Woolnoth*'s name, that takes away the presumption of the identity of the person at the former trial, and the court were right in refusing it, unless the party producing it would shew him to be the same person, but *Woolnoth*'s is so loose an evidence, that I should not be inclinable to grant a new trial on such an ingredient only.

Another objection taken by the defendant was, that there has been a considerable delay in the cause, and that nine or ten witnesses examined at the former trial in *Kent*, are since dead, that gave material evidence for the defendant *Hart*'s mother, who called herself the wife of Admiral *Hosier*.

As to that, the plaintiff brought a new ejectment soon after, and had judgment by default, and the defendants, by collusion, prevailed on the tenants to attorn.

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As to the death of witnesses, they are mortal, and no person can keep them alive, but this circumstance had weight with the jury in the last trial, and they considered the evidence then given for the defendant with the greater benignity and indulgence, and to be sure is a material ingredient for a court and jury to take into their consideration, where there is a great length of time between the two trials.

The marriage is extremely improbable, the licence was taken out by the woman, the intended husband in it called *Francis Hosier*, mariner, at the same time he was a captain of a first rate man of war; it is said, in excuse, he had a mind to conceal his marriage, but it is much more likely she had it filled up in this manner to conceal it from the whole world, in order to set up a marriage after his death, and at this rate any man might be married to a common woman. [546]

In the ecclesiastical court the defendant's mother was determined not to be the wife of Admiral *Hosier*, upon a contest there, relating to the right of administration to his personal estate, and yet, upon a trial at law relating to the real estate, was found to be his wife.

It is very much to be lamented that there should be such different determinations in two concurrent jurisdictions; but though it is a great absurdity, there is no way to make them uniform; I know but one case where this variation of judgment has happened, and that was the case of *Maxwell* and Lord *Mountague*; there a testator was determined to be *compos mentis*, upon a suit in the ecclesiastical court, and that sentence was affirmed in the court of delegates: afterwards, on a trial at law in relation to the real estate devised by the will, the testator was found *non compos*, and then an application was made to the House of Lords by petition, to reverse the sentence in the court of delegates, in order to make the determinations uniform, but the House of Lords dismissed the petition, because the sentence of the delegates is decisive, and no appeal lies from it.

In the ecclesiastical court a testator was determined to be *compos mentis* and that sentence affirmed before the delegates; afterwards, on a trial at law in relation to the real estate, he was found *non compos*; an application to the House of Lords to reverse the sentence, but the petition was dismissed, because that sentence was decisive, and no appeal lies from it.

I am of opinion, on the plaintiff's paying the costs to the defendant, that he should be at liberty to lay all these circumstances before a jury; but the question will be, how it should be tried? I will direct a trial at bar in the court of King's Bench, provided the party praying a trial at bar will consent, that, if he prevails, he will be contented with *nisi prius* costs, and on those terms, I am of opinion, this matter should be tried again; and Lord *Hardwicke* gave directions accordingly (1).

A trial at bar directed in the court of King's Bench, on the party's who prayed trial at bar consenting, that if he prevailed, he would be contented with *nisi prius* costs, or otherwise it would not have been granted.

(1) *Reg. Lib.* A. 1746. fol. 796.

Case 200. *Head* versus *Head*, *May* 20, 1747.

S. C. 1 Vef 17. ante 295 511. The depofition of a wife of a prochein amy annot be read, as the hufband is liable to cofts.

THE bill was brought for the arrears and growing payment of an annuity of four hundred pounds a year from the defendant Sir *Francis Head*, purfuant to an agreement between the plaintiff and the defendant for that purpofe, and to eftablifh the agreement for a feparate maintenance.

Mr. Attorney General, for the plaintiff, cited the cafe of *Oxenden* verfus *Oxenden*, 2 *Vern*. 493. and *Seeling* verfus *Crawley*, *ib*. 386. and *Angier* verfus *Angier*, *Prec. in Chan*. 496. *Gilb. Eq. Rep*. 152.

The defendant's counfel objected to the reading the depofition of *Jane Genew*, the wife of *John Genew*, as her hufband is the *prochein amy*, and liable to cofts.

Lord Chancellor allowed the objection.

The counfel for the plaintiff read next Sir *Francis Head*'s letter to Sir *William Boyce*, Lady *Head*'s father, being an agreement to pay Lady *Head* four hundred pounds a year, dated *Auguft* 25, 1740, which was as follows:

Dear Sir *William*,

"I fhall always with pleafure remember my dear *Quinette*'s "many good qualities, and be far from imputing her misfortunes "as faults, but as it will be much eafier for me not to be a con-"ftant witnefs to what we can neither of us help, *I am willing* "*to fend her* 100 l. *and no more, between this and* Chriftmas next, "*and to continue her fuch quarterly payments, when it fhall beft* "*fuit my convenience, fo long as we fhall continue feparate*, with this "one provifo, that if you fhould think at any time my pretty "*Gabrielle* fhould want any kind of inftructions, fhe may be fent "to me, who will always receive and inftruct her as my child, "according to my parental duty; and have nothing further to "add but my prayers that we may all enjoy quiet here, and ever-"lafting quiet hereafter, and am

Dear Sir *William*,

Your moft dutiful fon, &c.

Francis Head."

[548] The plaintiff by her bill feeks to eftablifh this as an agreement for her feparate maintenance, and to fecure the payment of four hundred pounds a year for her life.

Mr. Solicitor General of the fame fide: By a fubfequent letter, dated the 22d of *September* 1741, to Lady *Head*, Sir *Francis* fays, "upon fending a receipt you may have *your* money on de-"mand."

What is *your* money? Why, the money he had agreed to pay her.

The pretence of her being difordered in her fenfes, is as long ago as 1739, and fubfequent to that, for four years, here is, by feveral letters, an acknowledgment the agreement was fubfifting, and payments in purfuance of it, and the defendant never offered to take her home till the bill filed.

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There is evidence too of Sir *Francis*'s endeavour to convey her to a mad-house, without giving her the least notice; and on her application a writ of *supplicavit* issued; and though, by his answer now, he offers to take her home, he says, at the same time, he shall shut her up, considering her as mad; this is the very thing which the court attempted to obviate by *the supplicavit*; and notwithstanding Sir *Francis* moved that it might be discharged, yet your Lordship refused it.

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To shew that a woman, after a separation, is not obliged to go home to her husband when he shall think proper to take her back again, unless there is a prospect of living happily, and in harmony together, he stated the case of *Steeling* versus *Crawley*, 2 *Vern.* 386.

Mr. *Brown* for the defendant.

Sir *Francis Head* married in 1726; Lady *Head*'s fortune was 4000*l.* down, and 4000*l.* more on the death of the survivor of Sir *William* and Lady *Boyce*.

Angier versus *Angier*, is a case with very different circumstances, for there was a clear agreement for a separation, and the behaviour between the husband and wife both equally bad.

He cited the case of *Whorwood* versus *Whorwood*, in 1 *Ch. Cas.* 250. where, after a decree for a separate maintenance, the court, on a bill of revivor brought, would not continue it, as the husband offered to take her back; but in the case of Sir *George Oxenden*, cited for the plaintiff, it does not appear the husband offered to take her back again.

In all the cases cited, or that can be cited, where an agreement for a separate maintenance has been decreed, a clear agreement has been manifested to the court, but in the present case it is very far from being so, for in the letter to Sir *William Boyce*, Sir *Francis* does not say so long as we shall *live* separate, but *continue* separate only. [549]

Lord Chancellor stopped Mr. *Clarke*, who was counsel for the defendant, from going on to shew that this was not originally intended as an agreement to continue during their joint lives, because he did not see it at all in that light; but the material question will be, whether the occasion for this separation ceases or not?

Mr. *Clarke* cited *Octavo Chanc. Rep.* 222. a bill was brought by a husband to set aside a decree of separation obtained during the interregnum; Lord Chancellor *Clarendon*, referred it to the twelve judges to certify their opinion, whether the act of parliament had confirmed the judicial proceedings before the restoration, and they were of opinion it had.

This case of *Whorwood* versus *Whorwood*, came on again before Lord Keeper *Bridgeman*, and is mentioned by Sir *Lionel Jenkins* in his life and letters, *p.* 723. the court did not indeed reverse the decree, but then they let it lie dormant, and if the wife did not return to the husband, left it open to proceed against her in the ecclesiastical court, for a restitution of conjugal rights.

Lord

HEAD v. HEAD.

Lord Hardwicke, to give the friends of each side an opportunity of interposing in order to bring about a reconciliation, adjourned the cause from time to time till the 3d of *July* 1747, and then gave his opinion.

Two questions arise upon this case; first, whether here was any such agreement between the parties for a perpetual separation and maintenance, as this court will establish?

Secondly, Whether, in case there was no such agreement, Sir *Francis* has, by his behaviour to Lady *Head*, given reason for the court to decree her a separate maintenance?

Now, as to the first of these two questions, here was no agreement for the parties to live separate, and for Sir *Francis*'s making this allowance for alimony, but merely during an occasional absence, and for his lady's support whilst that lasted.

It is therefore to be considered, whether any thing has happened since the making of this agreement to put an end to it, and to induce the court to decree the maintenance for the future,

[550] and what effect this consideration will have upon the general relief prayed by the bill, by which liberty is required for Lady *Head* to live separate, and that the court would decree her husband to pay her maintenance, and likewise what effect this will have upon the arrears already due.

No instance of a decree for establishing a perpetual separation betwixt husband and wife, and to compel him to pay her a separate maintenance, unless there is an actual agreement for that purpose.

As to the liberty prayed, it is not in the power of the court to decree it; and I do not find that this court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this unwillingly (1).

The agreement betwixt Sir *Francis* and Lady *Head* was only for the payment of a maintenance during an occasional absence; now, consider what has been done to put an end to this agreement.

Lord Hardwicke then stated the evidence of Lady *Head*'s disorder, and Sir *Francis*'s intention of carrying her by force to a mad-house, and then went on as follows; I cannot say that Sir *Francis*'s behaviour upon this occasion was proper, he should have first gone and satisfied himself of his Lady's condition before he had made such an attempt, but yet, upon the circumstances of her conduct, I will not say that this was such an act of cruelty as would forfeit the right and authority of an husband, or would be sufficient ground for the spiritual court to decree alimony, and separation upon.

(1) See *Watkins* v. *Watkins*, *ante* 2. vol 96 98. *Fonb Treatise of Equity*, 1 vol. 96

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The point of the *supplicavit* granted to Lady *Head* is carried too far: the having obtained a *supplicavit* is no reason that a wife should elope from a husband, for it is a security taken for the wife, upon a supposition that they are to live together.

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The obtaining a *supplicavit* does not justify a wife's elopement from her husband, for it is a security taken for her on supposition they are to live together.

He then stated the case of *Whorewood* versus *Whorewood*, 1 *Ch. Cas.* 250. and the opinions of the Lord Keeper and Lord *Shaftsbury*; and observed, upon Lord *Shaftsbury*'s sending the parties to their remedy in the ecclesiastical court, that it must haye been grounded upon this, that as the court of chancery had succeeded to the jurisdiction of the spiritual court in matters of alimony, &c. during the rebellion, a decree then made by the court of chancery in pursuance of this jurisdiction was to be taken as a sentence of the spiritual court, after their jurisdiction was restored, and to be referred thither for its examination.

Then his Lordship read the passage from Sir *Leoline Jenkins*'s letters, from the words *These are other cruelties so called*, to the words *the decree in question*.

His Lordship then repeated the reasons given in the book for the opinion in that case, and applied them to the present, by saying in this case nothing appeared to shew the husband had rendered himself incapable of demanding the return of his wife, and that as the wife appeared unreasonably averse from returning, he could not make a decree for the continuance of the alimony. [551]

As to the arrears of the separate maintenance, he decreed them to be paid, because, he said, some things which had happened on Sir *Francis*'s part, were an excuse for my Lady's not returning to him till this *judicial* offer of receiving her had been made by the answer of the husband; as for instance, *Sir Francis's letter, his attempt to carry her to a mad-house*, &c. and that these were very good pretences for not putting herself under his power, especially where the court had thought there were grounds for granting her a *supplicavit*.

His Lordship decreed the arrears to be paid to Lady *Head*, but that Sir *Francis* having offered to receive her again, he should receive and treat her as his wife if she would return; but in case she did not return in a month, the maintenance should cease for the future; and on the other hand if she returned home, and the defendant refused to receive, maintain, and treat her as his wife, the separate maintenance should then continue (1).

(1) *Reg. Lib.* A. 1746. fol. 626. In *Guth* v. *Guth*, 3 *Bro. Cha. Rep.* 614. the court decreed a specific performance of articles of separation, though the husband by his answer offered to receive his wife again. *Vide Ball* v. *Montgomery*, 4 *Bro. Cha. Rep.* 339.

Case 201. *The Attorney General* versus *Lloyd and others, July* 31, 1747.

THIS came before *Lord Chancellor* on an appeal from the Rolls, upon a question arising from the will and codicil of Mr. *Millington*.

1 Vef. 32. S. C. *J. M.* by will dated *February* 8, 1734, gives particular lands and his perfonal eftate *to be laid out in lands to charitable ufes*, and declares by codicil, *July* 12, 1736, if by the mortmain act the eftates cannot pafs to thofe ufes, he gives them to *M. B.* and his heirs.

James Millington, by his will dated the 8th of *February* 1734, gives particular lands and his perfonal eftate to be laid out in lands to charitable ufes; then by a codicil, dated the 12th of *July* 1736, recites his will, and that he had devifed his lands to fuch ufes, "but that there had been an act of parliament, in-"titled *The mortmain act*, and being in doubt whether the de-"vife made by him to fuch charitable ufes would be good or "not, and being ftill defirous, as far as in him lies, to confirm "his faid will, neverthelefs if by the act of parliament, or by "*any conftruction of law thereupon, the eftate is not well de-"vifed, and cannot go to thofe ufes; then and in fuch cafe I give "thofe lands to *Millington Buckley* and his heirs."

By a fecond codicil of the 17th of *March* 1736-7, reciting he had been advifed the devife of his lands was void, gives his perfonal to the fame charitable ufe, and his real eftate to the defendant *M. B.* The mortmain act paffed in 1736, and the teftator died the 8th of *February* 1737. *On a cafe ftated for the opinion of the court of King's Bench, the Judges certified it was their opinion thefe eftates were well devifed by the fecond codicil to Millington Buckley* (1).

[*552] The fecond codicil dated the 17th of *March* 1736-7, reciting as aforefaid, "that being advifed the devife of his lands would "be void, and it being my intention the charity fhould be con-"tinued, and being advifed my perfonal eftate can be given, I "do therefore by this codicil give my perfonal eftate to the cha-"ritable ufes before mentioned, and I do hereby give my real "eftate to the defendant."

The mortmain act paffed in 1736, and teftator died the 8th of *February* 1737.

The *Mafter of the Rolls*, on the 10th of *December* 1744, decreed the will and codicils to be well proved, and that they fhould be eftablifhed and the trufts thereof ought to be performed; the defendant *Millington Buckley*, who had attained his age of 21, apprehending himfelf aggrieved by this decree, for that there was not any declaration therein, that the eftates in *Stretton* and *Shrewfbury*, on his arriving at 21, would belong to him, he therefore appealed to Lord Chancellor.

The Attorney General for the charity cited *Onyons* verfus *Tyers*, 2 *Vern.* 741. and the fame cafe in *Prec. in Chan.* 459. called there *Onyons* verfus *Tryers*, and *Salk.* 592, and Sir *Robert Clifton* verfus *Lady Lombe* (2), on the conftruction of Sir *Thomas Lombe*'s will, before Lord Chancellor *Hardwicke*.

Mr. *Wilbraham* of the fame fide cited *Afhburnham* verfus *Kirkhall* (3). where it was certified by the opinion of all the Judges to

(1) *Vide Afhburnham* v. *Bradfhaw*, *ante* 2 vol. 36. note 1.

(2) *Amb.* 519. S. C.

(3) *Ante* 2 vol. 36.

Lord *Hardwicke* on the 4th of *December* 1739, that a devise of lands under a will to charitable uses made before the statute of mortmain, notwithstanding the testator survived the statute of mortmain, passes the lands.

Mr. Solicitor General for the defendant cited *Coggershall* versus *Coggershall* before the council, in the presence of two chief justices, the ground of the determination there was a total incomplete will, and was therefore set aside.

Lord *Hardwicke* stopped the Attorney General when he was going to reply for the charity, and said, that he was very doubtful about the construction of this will, and that he would tell them why, though he did not intend, nor could he give any absolute opinion.

[553] This is a case which is extremely different from all the cases cited, a case in which the revocation of the former, or the validity of the new disposition, does not at all turn upon collateral acts or circumstances, but merely upon the words of the first and second codicils, and the whole arises upon the construction of the instruments themselves: in that respect it differs from the case of *Onyon* versus *Tyer*, for that turned entirely upon the collateral acts made use of by the testator towards the execution of the second, and the cancellation of the first will; and there Lord *Cowper* was doubtful of the advantage that could be taken of those circumstances at law, and he concludes, as it is mentioned in *Vernon*, *that in case it had been a good cancelling of the will at law, it ought to be relieved against, and the will set up again in equity under the head of accident.* But how he would have come at it there, if the law had said, that the first will was revoked, I cannot see; or how a court of equity can set up a will against the heir which was revoked at law; this is the principal case of all that has been cited.

The reasons, that make me doubt of the construction contended for on the part of the charity, are these:

First, If the testator had intended what the relators contend for, that the codicil should be a revocation of the first devise, and a new devise only in case his will should be determined to be void; he might as well have left it upon the first codicil, unless only in respect of changing the disposition of the personal estate, for there was occasion of alteration as to the personal estate, but not as to the real.

Secondly, It is a very nice thing to say, that because the reason a man gives for his devise is false, therefore his devise shall fail, and how far that will extend I cannot say: but here he has put the devise upon the fact itself, for the words of the second codicil are, *that being advised the devise of his lands would be void, &c.* (*vide the words before*). That he was so advised was a fact in his own knowledge, and he has grounded his devise upon this advice, and not upon the reality of the law, though that should come out in the event one way or another, upon that he makes his determination, which he might do to quiet a doubtful question, I will not have this litigated after my death, but I will settle it myself upon some certain foundation.

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Thirdly, And this is the principal reaſon I doubt whether this different diſpoſition is put ſingly upon the point of law; the words of the laſt codicil are very material, *It being my intention the charity ſhould be continued, and being adviſed my perſonal eſtate can be given, I do therefore by this codicil give my perſonal eſtate to the charitable uſes beforementioned; and I do hereby give my real eſtate to the defendant Millington*; who can tell what the teſtator

[554]

meant by theſe words? he might be adviſed that his perſonal eſtate might be ſo much increaſed as to be ſufficient to ſupport the charity, (for the codicil was made a conſiderable time after the will). if he took the whole into his conſideration, the point of law upon the ſtatute, that the deviſe of the real eſtate would be void, that he might make a good diſpoſition of his perſonal eſtate to the uſes of the charity, and that the perſonal eſtate would be ſufficient for that purpoſe, all theſe reaſons might be the ground of his diſpoſition.

Theſe things make me doubt greatly of the conſtruction of this will, and it is a new point. I think therefore it ſhould undergo a ſolemn determination; it is a legal queſtion, and upon a legal deviſe, and I will make a caſe, and ſend it to the Judges to have their determination upon it.

His Lordſhip accordingly ordered a caſe to be made on the teſtator's will and codicils, and the act of parliament to prevent the diſpoſition of land, whereby the ſame became unalienable, for the opinion of the Judges of the court of King's Bench, and the queſtion was to be, whether the teſtator's real eſtate in *Stretton* and *Shrewſbury* were well deviſed by the ſecond codicil dated the 17th of *April*, 1735, to the defendant *Millington Buckley* for life with remainder over to his firſt and other ſons in tail male, the ſaid *Millington Buckley* having obtained his age of 21, and the Judges of the court of King's Bench were to be attended with the caſe, and reſerved all further direction till after the Judges ſhould have made their certificate.

The Judges of the court of King's Bench having been attended with the caſe, they by their certificate dated *January* 24, 1748, certified that upon hearing counſel on both ſides on the queſtion ſtated, and on conſideration of the caſe, they were of opinion, that the teſtator's real eſtates in *Stretton* and *Shrewſbury* were well deviſed by the codicil dated the 17th of *March*, 1736, to *Millington Buckley* for life, with remainder over, as limited in the codicil.

Lord Chief Juſtice *Lee*.
Mr. Juſtice *Wright*.
Mr. Juſtice *Dennison*.
Mr. Juſtice *Foſter*.

On the 5th of *May*, 1749, Lord *Hardwicke* in conſequence of the certificate declared, that *Millington Buckley*, having attained his age of 21 years, is intitled to the teſtator's real eſtate in *Stretton* and *Shrewſbury* for his life, with remainder to his firſt and every other ſon in tail male ſucceſſively, and referred it to a Maſter to take an account of the rents of all the premiſes in *Stretton* and *Shrewſbury*, accrued ſince the 10th of *September*, 1747,

1747, when *Millington Buckley* attained 21, and what shall be coming upon the balance of the account, to be paid by the trustees to *Millington Buckley*. ATTORNEY GENERAL v. LLOYD.

Forward versus *Duffield*, *August* 1, 1747. Case 202.

LORD CHANCELLOR,

WHERE *A*. has several demands against *B*. and *B*. pays money generally to *A*. he may apply it to the payment of such debt as he thinks proper, for the rule is *solvendum ad modum recipientis*.

The defendant brought an action against the plaintiff upon the whole penalty of a charter-party, where part of the money was due only, and had judgment on the whole penalty, the defendant at law comes into equity to be relieved upon paying the principal and interest.

The plaintiff in a charter-party is right in suing on the whole penalty, though only a part of it remained due, but on offering to pay principal, interest and costs, the defendant at law may be relieved in this court.

The plaintiff at law is right in suing upon the whole penalty, though only part of the debt remained due: and so it is in the case of a common bond; an obligee, though only part is unpaid, may bring an action on the whole penalty: but then the obligor is as right in bringing a bill to be relieved on paying the principal, interest and costs; and if the obligee will put in a bad answer, and insist on more than is really due, he shall lose his costs here, though intitled to his costs at law.

If an obligee will put in a bad answer, and insist on more than is really due, he shall lose his costs here though intitled to them at law.

Lord Chancellor "ordered the Master to compute interest "on 546 *l*. 10 *s*. 7 *d*. the balance due to the defendant from the "end of three months after the landing of the ship's cargo, at "5 *per cent*. and that 180 *l*. paid by the plaintiff to the defend-"ant under an order of the 12th of *February* 1742, be applied "towards keeping down the interest, and afterwards towards "sinking the principal of the balance; and on the plain-"tiff's paying the defendant the residue of what shall be "found due to him for such principal and interest with the "costs, that both sides do deliver up the charter-party, and the "defendant acknowledge satisfaction on record of the judgment "obtained by him at the plaintiff's expence, and in default of "payment by the plaintiff at the time appointed by the Master, "the bill to be dismissed with costs."

Powis versus *Corbet*, *August* 6, 1747. Case 203.

LORD CHANCELLOR, [556]

THE estate made subject to a 500 years term by the will of *Corbet Kinaston*, for the payment of debts, must first be applied before the creditors can come upon the estate descended on his heir at law; for if a testator has created a particular

Where a testator has created a particular trust out of particular lands for the payment of debts, and subject to the trust devised it over, the devisees can take no benefit till after the whole burden is discharged upon it.

Powis v. Corbet.

trust out of particular lands, and subject to that trust devised it over, the devisees can take no benefit but of the remainder, after the whole burden is discharged upon it; and as to that, the heir at law stands in a better place than the devisees do (1).

Assets descended on the heir at law must be applied to the payment of debts before the lands can be charged, which are specifically devised.

The next question is between the devisees of the real estate which passes by the codicil, and the heir at law of the testator; undoubtedly, according to the determination of *Galton* versus *Hancock* (2), *June* 11, 1743, the assets descendible on the heir at law must be applied to the payment of debts before the lands can be charged, which are specifically devised.

The rule of the court as to a mortgagee who is likewise a bond creditor, is, that he may tack it to the mortgage as against the heir, because assets being descended he cannot redeem one without paying off the other. (3).

Another defendant in this cause and mortgagee, *Amye Kynaston*, was likewise a bond creditor to *Corbet Kynaston*, her counsel insisted she had a right to tack it to the mortgage as against the heir, because assets being descended he cannot redeem one without paying off the other, for the court will not make a circuity by putting her to the necessity of suing on the bond; and they insisted further that the rule was the same with regard to a devisee, and that the court will not oblige a mortgagee, who is likewise a creditor by bond, to sue him under the statute against fraudulent devises.

Lord Chancellor agreed this was the rule of the court as to a mortgagee, who is likewise a bond creditor against the heir; but did not remember it was ever determined in favour of such mortgagee where there are intervening incumbrancers of a superior nature between his mortgage and the bond, and therefore would not direct that Mrs. *Kynaston*'s bond should be tacked to her mortgage.

(1) *Sed vide Walker* v. *Jackson*, *ante* 2 vol. 625.

(2) *Ante* 2 vol. 424. 427. 430. S. C.

(3) *Vide Morret* v. *Paske*, *ante* 2 vol. 53. notes 1, 2. *Heames* v. *Bance*, *post*. 630. *Troughton* v. *Troughton*, *post*. 659.

Case 204.

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Pyncent versus *Pyncent*, *August* 6, 1747.

Depositions referred for impertinence, the Master reported them impertinent; on exceptions taken to his report, ordered to stand over till the hearing, the court being doubtful, whether depositions could be referred for impertinence only.

THE depositions of a witness in this cause were referred for impertinence, the Master reported them to be impertinent, and the witness has taken exceptions.

Lord Chancellor ordered it to stand over till the hearing of the cause, being doubtful whether a deposition could be referred for impertinence only, for in the case of *Cocks* versus *Worthington* (1), *December* 14, 1741, and the other cases therein mentioned, the reference was for scandal as well as impertinence.

(1) *Ante* 2 vol. 215. S. C.

Neve versus *Weston and his Wife*, *August* 7, 1747. *In the Paper of Pleas and Demurrers.* Case 205.

A Bill had been brought by a single creditor in behalf of himself and other creditors, against the executor of *William Northmore*, and the devisee of his real estate: the present plaintiff came in under the decree in that cause before the Master, and proved his debt; and now brings his bill in the name of himself and other creditors of *William Northmore* against his devisee and executor, and makes his heir at law a party, who was not so to the other suit.

The devisee and executor plead the former suit is still depending.

LORD CHANCELLOR,

A man who comes in before a Master under a decree, is *quasi* a party to that suit, the present plaintiff does not by his bill make any case to shew it was absolutely necessary that the heir at law should be brought before the court, and therefore allowed the plea (1).

Whoever comes in before a Master under a decree is *quasi* a party to that suit; and if he brings a new bill, a plea, that the former suit is still depending will be allowed.

(1) *Reg. Lib.* B. 1746. fol. 490. *Vide Law* v. *Rigbey*, 4 *Bro. Cha. Rep.* 60.

Bicknell versus *Gough*, *August* 7, 1747. Case 206.

[558]

A Bill was brought for a discovery of the defendant's title, charging fraud in the defendant, and praying to be let into possession of the estate.

The defendant pleaded the statute of limitations both to the discovery and relief.

LORD CHANCELLOR,

I am of opinion the defendant cannot plead the statute of limitations to the discovery, but must answer to the fraud; and that, as the defendant has pleaded it, it is in the nature of a demurrer, for the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own shewing, if I was to allow the plea, the plaintiff could not take exceptions to the answer, and therefore over-ruled the plea.

When fraud is charged, the defendant cannot plead the statute of limitations to the discovery of his title, but must answer to the fraud (1).

(1) *Vide. Deloraine* v. *Brown*, 3 *Bro. Cha. Rep.* 633.

Skip versus *Warner*, *August* 10, 1747. *Last Seal.* Case 207.

A Motion was made to dismiss a bill for want of prosecution; the cause has proceeded so far, as that a commission has been taken out, but nothing has been done upon it, but publi-

 cation

SKIP v. WARNER.

cation has past, and issue being joined, the question in dispute before his Honor was, whether it must not be set down *ad requisitionem defendentis*; or whether, according to the rule of the court, the defendant may not move to dismiss for want of prosecution; his Honor had some doubt, and directed it to be moved before Lord Chancellor.

LORD CHANCELLOR,

You cannot move to dismiss a bill after publication is past, and it is no hardship to the defendant, for if the bill is dismissed at the hearing, he will have his full costs.

I know of no rule, that the defendant may move to dismiss a bill after publication is completely past; the modern practice has been after a *subpœna* to rejoin, and even after a commission for examination of witnesses, if nothing has been done under it, to dismiss the bill, but the defendant here is under no hardship, because, when it comes to a hearing, this cause will not be considered as on bill and answer only, and therefore the defendant may have his full costs if the bill should be dismissed at the hearing: Lord *Hardwicke* denied the motion.

Case 208. [559]

Ex parte Johnson, August 11, 1747.

An infant, on whom a trust is descended, may, on order of court, convey by a common recovery.

MR. *Thompson*, a devisor, being a trustee, devised all his estate to his son, an infant in tail, with remainders over.

A petition was preferred, that the infant on whom the trust is descended may be ordered to convey by recovery, pursuant to the statute of 7 *Ann. c.* 19.

Lord Chancellor, at first, thought there must be an application for a privy seal for this purpose (1), but the act being general, that the infant *shall convey lands as the court by order shall direct*: his Lordship in this case made an order, that the infant should convey by *a common recovery* (2).

(1) *Ex parte Bowes, ante* 164.

(2) *Reg. Lib* A. 1740. fol. 426. *Ex parte Smith, Amb.* 624. So an infant mortgagee or trustee, who is a *feme covert*, may convey by *fine*. *Ex parte Mane, ante* 479. *Com.* 615.

Case 209.

Mackensie versus *Robinson, August* 11, 1747.

A mortgagee must accept of a mortgagor's nominee, to an avoidance of an advowson; for, instead of bringing a bill of foreclosure, he should have prayed a sale of the advowson.

A Petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson may accept of his nominee, and present him upon an avoidance, the incumbent being dead.

Mr. *Clarke*, of counsel for the mortgagee, insisted, as there is a large arrear of interest, he ought to present, if any advantage accrues from it, and cited the case of *Gardiner* versus *Griffith*, 2 *Wms.* 404. there the plaintiff's father being possessed of a 99 years term of the advowson of *Eckington*, made a mortgage thereof to the defendant, and in the mortgage deed was *a covenant that on every avoidance of the church the mortgagee should present*;

sent;

sent; the court gave no opinion, but seemed to incline that the defendant *Griffith*, the mortgagee, had a right to present. MACKENSIE v. ROBINSON.

LORD CHANCELLOR,

I am of opinion that the mortgagor ought to nominate (1), and that it is not presumed any pecuniary advantage is made of a presentation; to be sure, these are indifferent securities, but the mortgagee should have considered it before he lent his money, and instead of bringing a bill of foreclosure, as he has done in this case, should have prayed a sale of the advowson.

Lord Chancellor mentioned the next day, that he was not quite clear as to this point, and that he had looked into the case of *Gardiner* versus *Griffith* since yesterday, according to the state of it in the House of Lords, where the decree of Lord Chancellor *King* was affirmed: he said, that was a mixed case, and that he doubted himself whether a covenant that the mortgagee should present (as was the case there) was not void, being a stipulation for something more than the principal and interest, and the mortgagee cannot account for the presentation: Lord *Hardwicke* adjourned it for further consideration to the next day of petitions. [560]

Upon the 21st of *October* following, this petition came on again, and the mortgagee, not being able to find any precedent in his favour, gave up the point of presenting, and an order was that the mortgagor should be at liberty to nominate, and the mortgagee was obliged to present the mortgagor's nominee (2).

(1) *Vide Amhurst* v. *Dawling*, 2 *Vern.* 401. *Attorney General* v. *Scarisbrick*, *ibid.* 550. *Jory* v. *Cox*, *Pre. Cha.* 71. *Galley* v. *Serjeant Selby*, 1 *Stra.* 403. *Com.* 343. S. C.

(2) *Reg. Lib.* B. 1746. fol. 479. Note. It was stated in the petition, that there had been a similar decree previous to the above order in the Exchequer upon a former avoidance.

Shields versus *Atkins*, *August* 10, 1747. Case 210.

It would be dangerous, where a person enters on the foot of the trust, and never makes any declaration of his having performed the trust in pursuance of the will, to construe this such an entry, as that a fine and non-claim would bar the right of the plaintiff a remainder man.

ROBERT *Shields* of *Nunthorpe* in *Yorkshire*, being seised in fee of a messuage and lands in *Great Ayton*, by his will dated the 6th of *December*, 1710, "devised to *Robert Shields* of *Carl-*" "*ton*, carpenter, from and after the decease of *Ann*, the testa-" "tor's wife, the said messuage and lands, to hold to the said" "*Robert Shields* the carpenter, and his heirs and assigns, in trust," "till the rents and profits of the said devised premisses shall raise" "and pay the several legacies and bequests therein after men-" "tioned, and so soon after his said estate shall by the rents and" "profits have raised and paid the same, he gave the said pre-" "misses to *Robert Shields*, son to his brother *William Shields*, *for* "*his life*;" (then follow these words, and) "being my will is," "that the said *Robert Shields* the carpenter, and his heirs, shall" "have a contingency of enjoying my said estate, and yet not" "designing to oust my said nephew *Robert Shields*, nor his issue" "or issues, (so long as there shall any remain in the line from

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"his body directly), from and after the deceafe of him my faid "nephew *Robert Shields*, I give the premiffes aforefaid unto the "heirs of his body, male or female, for his or her natural life, "and after his or her deceafe, to his or her heirs, males or fe-"males, of his or her body, for their lives, *and fo to be continued* "*as a life eftate only in the line of him my faid nephew* Robert "Shields, *his iffue, and their iffue of their bodies, one after another,* "*fo long as any fuch* fhall be, and for default of fuch iffue, then "I give the faid premiffes unto the faid *Robert Shields* carpenter, "my faid truftee, his heirs and affigns for ever."

The teftator died foon after, and, upon his death, his widow entered upon the faid meffuage and lands, and enjoyed the fame till her death in the year 1724, and then *Robert Shields* of *Carlton*, the plaintiff's father, as truftee under the will, entered thereupon, and out of the rents and profits paid feveral of the legacies; and he dying about the 5th of *November* 1726, the plaintiff, as his fon and heir at law, entered upon the faid premiffes, and for fome time received the rents, and thereout paid off the refidue of the legacies.

[561] *Robert Shields*, the nephew of the teftator, went beyond the feas in the life of *Ann* the teftator's widow, and being upon his return to *England*, fell fick on board the fhip, and thereupon being fet on fhore in the *Weft* of *England*, died there, having never been in poffeffion of the faid premiffes, and left *Jane* his only child, an infant, and the defendant *Mary* his widow; the plaintiff received, for fome few years afterwards, the rents of the premiffes, and remitted the fame to the defendant *Atkins* (brother of the defendant *Mary*) for the ufe of *Jane*, and the defendant *Atkins*, for many years afterwards, received the rents for *Jane*'s ufe.

Jane died in the year 1737, without iffue, unmarried, and an infant, and upon her death, all the limitations of the faid premiffes under the will to *Robert Shields* the nephew, and the iffue of his body, being fpent, the plaintiff became intitled to the fee-fimple thereof, and in 1744 brought ejectments, but not being able to prove the deaths of *Robert* the nephew, and *Jane*, and terms likewife ftanding out, did not proceed to trial, and prays by his bill that thefe terms may not be fet up at law againft the plaintiff in any ejectment for the recovery of the poffeffion of the faid premiffes, and that he may have the title deeds delivered up to him, and that the defendants may account with the plaintiff for the rents and profits.

The defendant *Atkins*, as to fuch part of the bill as feeks an account of the rents accrued due fince the death of *Jane Shields*, or to be let into the poffeffion thereof, &c. pleads in bar, that by an indenture dated the 17th of *June*, 1723, *Robert Shields*, *the nephew*, in confideration of 200*l*. did grant and fell to the defendant and his heirs *all his right, title, ufe, intereft, reverfion and remainder*, of and in all the faid meffuage and lands, to hold the fame, and all the eftate, right, title and intereft of *Robert Shields the nephew*, immediately from and after the deceafe

cease of *Ann Shields*, and the expiration of the trust to *Robert Shields* of *Carlton*, for the payment of legacies, unto the defendant, his heirs and assigns for ever.

That the value of the estate purchased was but 8 *l.* 10 *s.* and therefore 200 *l.* was a full consideration, being subject to the widow's life-estate, and the payment of the legacies.

He admitted he entered on the death of the widow, and paid the legacies; and that in the twelfth year of the present king he levied a fine of the said premisses, with proclamations, but that no deed was made declaring the use of the fine, but the same was intended by the defendant to be to the only use of the defendant and his heirs.

That he, at, and from the time of leying the fine, was, and hath been ever since, and is now seised, and in the actual possession and receipt of the rents and profits of the said messuage and lands, and that neither the plaintiff, nor any other person by his order, did, within five years after such fine levied, and proclamations, make any entry into such messuage and lands; wherefore the defendant pleads the fine and proclamations to so much of the bill as aforesaid. [562]

Mr. *Wilbraham* for the plaintiff cited the case of *Mackil* versus *Clerk*, 7 *Mod.* 18. and in *Holt's cases* 615.

LORD CHANCELLOR.

The person who has levied the fine does not appear to me to have such a case as ought to be favoured, if in law or equity it can be got the better of; but if he has a right in law, I do not at present see that equity will take it from him.

The defendant did not take the purchase on the credit of the grantor's being seised in fee, for *Robert Shields* the nephew has granted to him only the right, title and interest he had in the land, and not the land itself, which creates a doubt even on the face of the conveyance itself, what kind of estate *Robert Shields* could convey.

To be sure, it is not clear what estate the nephew had under the will of his uncle, but *prima facie* it seems to me as if the grantor had only an estate for life (though I am not obliged to give an opinion) as the subsequent limitations are to the heirs of his body for life.

The plaintiff's counsel have made two objections; first, that the defendant's estate was but *pur auter vie*, and that after the death of the testator's widow, and *Robert* the nephew, he levied the fine.

If it had been a lease for years, determinable on lives, reserving rent, and the lives dead on which the estate determined, the defendant would have been a tenant by sufferance; and though there is a mixture of wrong, the landlord may affirm his title by accepting rent, therefore the tenant by sufferance is extremely like a tenant at will, and a fine levied by him will not avail, as has been determined in Mr. Justice *Fortescue's case* (1).

(1). *Ante* 124. 135. S. C.

If

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If a feoffment with livery be made, it is a disseisin, and a fine levied afterwards when the five years are run out, is a bar.

[563]

If the defendant had a mind to gain an estate by wrong, he should have made a feoffment with livery, which would have been a disseisin, and then a fine levied afterwards, and five years run out after the title accrued, is a bar.

But the present is not the case of a lease with a rent reserved, but a devise of an estate for life, with remainders over, and the wrong consequently is much greater.

The second objection is a more material one, and is a point of equity: that the next limitation in the will, after the estate for life to the widow, is to *Robert Shields* the carpenter, and his heirs, till the legacies are paid, and therefore this is a fee determinable on the payment of the legacies.

And it is very remarkable that the defendant's own deed expresses it to be a grant from the nephew of the said messuage and lands, after the expiration of the trust for payment of the legacies; and he admits by his answer, that his estate was not to commence till afterwards.

After *Ann* the widow, the nephew dies, then the defendant entered, but it was on the foot of the trust, for he says, he paid several legacies, so that he does not enter in contradiction to the trust, but in pursuance of it; and therefore, as a fine levied by a trustee shall never hurt a *cestuy que trust* (1), it will be very material at the hearing, whether the defendant is not to be considered as the trustee, by undertaking the payment of legacies on the very foot of the trust.

Suppose the plaintiff had entered, as he might by virtue of the limitation, before the legacies were paid, the court would have held him a trustee, and raised the legacies; and it would be hard if the defendant, after owning he entered upon the foot of the trust, and paid the legacies, should support the fine, for no other reason but because he says he paid the legacies long before the fine was levied.

Suppose *Robert Shields*, the carpenter, had entered, and paid the legacies, and then levied a fine, this would not have given him such an estate as would have barred the remainder-men, because it would be dangerous, where a person enters on the foot of the trust, and never makes any declaration of his having performed the trust by payment of the legacies in pursuance of the will, to construe this such an entry as that a fine and non-claim afterwards would bar the plaintiff's right.

The remainder-man who was to take after the determination of the estate limited to *Robert Shields*, the trustee, could not tell when the limitation to himself took place in possession, without notice of the expiration of *Robert*'s estate, by all the legacies of the testator being paid, for it was not to be at the peril of the remainder-man to divine when the trust ended, but an account

(1) ...y v. *Smith*, 1 *Vern.* 60, 149. *S...* v. *Ld. W...*, *ante* 2 vol. 63

of the trust, and notice of expiration of the trust, must be given to him, and a person out of possession could not tell before. *Shipley v. Atkins.*

But if the defendant has gained a title both at law and in equity, I will not take it from him, and therefore let the plea stand for an answer.

Skip versus *Harwood*, *August* 11, 1747. Case 211.

THE plaintiff and the defendants had been partners together in the brewing trade, several disputes had arisen between them and actions, amongst the rest an action in the court of Common Pleas, and the partnership, by the consent of both, was dissolved in 1741.

A commission of bankruptcy cannot supersede a decree of this court for a receiver, which is a discretionary power exercised by this court with as great utility as any sort of authority that belongs to them, and is provisional only, and does not affect the right of parties.

Mr. *Skip* afterwards brings his bill here for an account of what was due to him from the partnership, and on the 30th of *June* last there was (1) a decree for a receiver to collect in the partnership debts, and that Mr. *Harwood* should not dispose of any part of the dead stock.

The morning of the decree Mr. *Harwood* removed no less than 250 butts of beer in a fraudulent collusive manner, in order to evade the decree he expected would be made in the cause, for he was present in court during the hearing, which lasted three days (2).

On the 14th of *July* a commission of bankruptcy issued against *Harwood*, and he was found by the commissioners to have committed an act of bankruptcy on the 11th of the same month.

The assignees under the commission, who are in possession of the goods that were clandestinely conveyed away, insist they have a right to detain them, notwithstanding the decree Mr. *Skip* has obtained, and that he must now come *in pari passu* with other creditors under the commission.

LORD CHANCELLOR,

A judgment creditor, to be sure, has no preference under commissions of bankruptcy, though execution has been taken out, if not actually executed; but then a commission of bankruptcy cannot supersede a decree of this court for a receiver, which is of a different consideration, and is a discretionary power exercised by this court with as great utility to the subject as any sort of authority that belongs to them, and is provisional only for the more speedy getting in of a party's estate,

(1) "An order that *Harwood* should "give security to pay what should be "found due on the balance of the ac-"counts and that the causes should "stand over. On the *sixth* of *July*, there "was a decree," &c.

(2) By an order of the *fifteenth* of *July* the court ordered that *Harwood* should bring back all the stock, which he had removed *upon* or *since* the 6th of *July*.

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and securing it for the benefit of such person who shall appear to be intitled, and does not at all affect the right; and therefore his Lordship made an order that the assignees, and all other persons who have taken any of the effects of Mr. *Harwood*, or notes of hand to him for debts due to the partnership (1) since the pronouncing the decree, shall deliver them to the receiver.

Where a person attends a cause to which he is a defendant and had notice of the decree by being present when it was pronounced, if he does any act in contravention to it, he is guilty of a contempt, and liable to be committed to the *Fleet*.

As to what has been insisted, that the decretal order is not actually passed, and therefore Mr. *Harwood* is not guilty of a contempt, his Lordship said, where a person, as Mr. *Harwood* has done, attends a cause to which he is a defendant the whole time of the hearing, and had notice of the decree by being present when it was pronounced in court, if he does any act that is a contravention to the decree, he is guilty of a contempt, and punishable for it notwithstanding the decretal order is not drawn up; and there are several instances of this kind, or otherwise it would be extremely easy to elude decrees, some of which in their nature require a considerable length of time before they can be completely drawn up.

Lord *Hardwicke* committed Mr. *Harwood* to the *Fleet* for his contempt (2).

(1) The words "since the pronouncing the decree", are not in the Register's book.

(2) "Of the orders of the *sixth* and *fifteenth* of *July*," *Reg. Lib.* B. 1746 fol 429. *Vide Anon. post* 567. *Pensyce* v. *Jonas*, 2 *Bro. Cha. Rep.* 141.

Case 212. *Pitt and others* versus *Reynolds and others*, *Second Seal before Michaelmas Term* 1747.

The court will not give leave to withdraw a replication, unless it is added that the plaintiff may be thereby enabled to amend his bill, or otherwise it may be a contrivance to defeat the defendant of his full costs, by getting the bill dismissed at the hearing with 40*s.* costs.

MR. *Bignell* moved that the order of the twenty-second of *July* last, for withdrawing the replication, may be discharged, or that the plaintiff may submit, if his bill be dismissed at the hearing, to pay the defendant full costs.

The order was obtained upon petition to the Master of the Rolls, upon an application merely for withdrawing the replication, and since the order the cause has been set down in Lord Chancellor's paper on bill and answer.

The defendant, upon an apprehension this order was obtained by the plaintiff only to save the full costs, moved it might be discharged.

LORD CHANCELLOR,

These orders are very rarely granted, unless, to the application for leave to withdraw the replication, something further is added, as that the plaintiff may thereby be enabled to amend his bill, or some reason that may induce the court to give the plaintiff this indulgence, because otherwise it may be a contrivance

trivance of the plaintiff to defeat the defendant of his full costs, by getting the bill dismissed at the hearing with forty shillings costs only. Lord *Hardwicke* ordered it to stand over till the first *Thursday* in the term, that the register may search for precedents, and at the same time said he should then expect the plaintiff to shew some reasonable ground for his withdrawing the replication.

POTT. v. REYNOLDS.

Sir Edward Smith versus *Aykwell, the same day in Michaelmas Term* 1747. Case 213.

MR. *Yorke* moved for an injunction to restrain the defendant either from bringing an action on a promissory note given by the plaintiff to the defendant in the sum of two thousand pounds, for undertaking to procure him a marriage with a Lady, or that the defendant may be prevented from assigning it over to any other person.

The plaintiff gave the defendant a note for 2000*l.* for undertaking to procure him a marriage with a Lady; the fact being supported by an affidavit, the court made an order on the defendant to keep the note in his own possession, and not assign or indorse it over, but would not extend the injunction so far as to prevent him from proceeding at law.

LORD CHANCELLOR,

This is not the common case for injunctions, which are for staying of waste, or quieting possession before the hearing to the party, who has had the same three years, on a bill brought upon a forcible entry; but yet the court, on extraordinary circumstances in a case, has granted an injunction till appearance and coming in of the answer, as in the case of *Powis* versus *Andrews* before Lord *King*, where an insolvent executor was getting in the assets before probate; there the court restrained him, and directed it to be paid into the Bank till answer and further order, and founded their directions on a case of a like nature before Lord *Harcourt*, which was the first instance, and approved and applauded by every body; the case of *Powis* versus *Andrews* went up likewise into the House of Lords, and was affirmed (2).

Where an insolvent executor is getting in the assets before probate, the court will restrain him, and direct the money to be paid into the Bank till answer and further order (1).

Here it is not only charged by the bill to be a marriage-brocage agreement (3), but the fact supported by an affidavit; and therefore I will make an order on the defendant to keep the note in his own possession, and not assign or indorse it over to any person whatever, but shall not extend the injunction so far as to prevent him from proceeding at law.

(1) *Vide Phipps* v. *Steward, ante* 1 vol. 286.

(2) 2 *Bro. Par. Ca.* 476.

(3) *Vide Mr. Cox's* note to *Roberts* v. *Roberts* 3 *P. W.* 74.

Case 214. *Anon. The second Seal before Michaelmas Term 1747.*

It is no excuse for proceeding at law after an injunction is granted, that it was not sealed, for where a defendant or his attorney have been present on an order for an injunction, and they have proceeded at law before it has been sealed, the court has considered it as a contempt, and committed the persons for it.

A Bill was brought to stay execution on a judgment obtained at law, and on service of the *subpœna*, and for want of an appearance, the plaintiff had an injunction, but it was not sealed; and in the vacation the defendant takes the plaintiff in execution, and during the vacation appears, and puts in his answer.

A motion was made, that the defendant might stand committed for the contempt of the court, in proceeding after an injunction had been granted.

The defendant swears by his affidavit, that he never was served with the *subpœna*, nor was either the body or the label left with him; and insisted besides, that the injunction was not sealed when he took the plaintiff in execution.

Lord Chancellor ordered the affidavit of the officer who served the *subpœna* to be read, who swears he served the defendant with it by leaving the label, and shewing him the body at the same time.

Lord Chancellor,

This is not regular service, because where there is only one defendant, you ought to leave the body of the *subpœna*; but where there are several, you leave the labels with the first defendants you serve, *shewing them the body only*, and with the last you leave the body itself; but as the defendant has appeared, this in the common case would have cured the irregularity of the service, and the defendant could not have taken advantage of it now, (the same rule at law), but as this was just before the long vacation, when the defendant chose rather to appear than be liable to an attachment, therefore he is at liberty still to insist upon not being served at all, or irregularly served; but as to the injunction's not being sealed, that is no excuse for his proceeding at law after the injunction was granted, because there have been instances here, where a defendant, or his attorney only, have been present upon an order for an injunction, and they have proceeded at law before it has been sealed, that the court have considered this as a contempt, and committed the persons for it (1).

Lord *Hardwicke* at first directed an inquiry before the Master; but as it is to be confined merely to the contempt, and the costs upon it, to save the expence of an inquiry, he recommended it to the plaintiff, if the defendant would agree to discharge him out of execution, to wave the motion; and the parties, on his Lordship's recommendation, did agree accordingly.

(1) *Vide Skip* v. *Harwood, ante* 565.

Lloyd versus *Nugent*, *October* 22, 1747, *in the Paper of Petitions.* Case 215.

Where a solicitor has been negligent in managing a client's business, this court can grant an attachment against him, as courts of law exercise the same summary jurisdiction over attornies.

THE defendant by his petition sets forth, that his solicitor, Mr. *Gordon*, had grossly misbehaved in the management of his client's cause, and therefore prayed that he may make the petitioner satisfaction, and also prayed by his petition to set aside the proceedings in the cause for surprise, and likewise for an irregularity in the plaintiff's proceedings before the decree.

LORD CHANCELLOR,

With regard to the complaint against the solicitor, there are the strongest circumstances of the grossest neglect, for all the instructions were sent from *Ireland* by the client to the solicitor that could be desired, and the answer returned from thence in order to be filed; but notwithstanding this it was not filed till the cause was set down upon a sequestration, and after this a decree *pro confesso* was pronounced.

The solicitor imputes it to the neglect of his clerk, he not being at leisure himself, because he was then engaged in crown causes.

If true, Mr. *Gordon* must answer it to the client as much as if his own immediate act.

There is no doubt but the solicitor must make satisfaction; as to the *quantum*, it depends on the other question between the defendant and the plaintiff, but let that come out as it will, I am very doubtful whether I can make any quantum satisfaction, for I cannot enter into that examination, because all the necessary materials in the case are not before me.

A client, to be sure, may bring an action against his solicitor for negligently managing his business, but courts of law have now exercised a summary jurisdiction by attachment over attornies, which they have very rightly, as it is a much readier remedy, and there is no doubt but this court has the same power over solicitors.

The next question is, with regard to setting aside the proceedings as between the plaintiff and the defendant, and that the cause may proceed regularly.

I refused it upon a former application, and dismissed the petition for want of an affidavit.

I imagine the party on the former petition presumed the court would do as in the case of *R[illegible]* versus *Cornwall*, but that was very different, because there the proceedings were regular, and the defendant put in an answer, &c. and no exceptions were taken to it, and it was only the decree's being signed and inrolled that made an extraordinary application necessary, or otherwise it would have been an application of course to rehear the cause, if the party had come in a reasonable time. [569]

But here exceptions may be taken by the plaintiff to the answer, and therefore is not at all to be governed by it,

Floyd v. Nangle.

What induces me to adhere to the ſtrict rules of the court is, that the former proceſſes of contempt were by colluſion between the ſolicitor Mr. *Gordon* and his client, in order to delay the plaintiff, which appears by *Nangle*'s own affidavit, who was adviſed by *Gordon*, as he acknowledges, to go to *Ireland* to delay the cauſe, and to ſtay there till *Gordon* ſhould think it ſafe to ſend for him.

But notwithſtanding, if there is an irregularity in the proceedings of the plaintiff, and the plaintiff inſiſts upon the ſtrict default of the defendant, as the courts of law ſay, it is very neceſſary a perſon inſiſting upon the rigour *ſhould hit the bird in the eye*.

Where after a judgment by default the perſon does not come in time for a new trial, the court will not grant it.

The courts of common law, where a perſon does not come in time, after a judgment by default, for a new trial, will not grant it, if the perſon in poſſeſſion of the judgment inſiſts upon it, but then he muſt take care that all his proceedings are regular in obtaining that judgment: the ſame rule upon an outlawry ſet aſide by motion or writ of error, or plea, where there is any irregularity.

The irregularity here was in this manner: *Nangle* after ſeveral orders for time to put in his anſwer, was by the laſt order to enter his appearance with the Regiſter, and ſubmit that the ſerjeant at arms ſhould go without further motion.

A ſerjeant at arms was granted on a certificate of the ſix clerks, that the anſwer was not filed.

An irregularity in proceſſes may be cured by the defendant's appearance.

The return of the ſerjeant at arms was in *June* 1746, but the return was not filed till the 24th of *October* after.

Then it comes to this, whether a ſequeſtration iſſued before the filing of the return of the ſerjeant at arms is ſufficient.

It has been inſiſted a ſufficient return of the ſerjeant at arms is made, and that it is enough without filing.

[570]

When a motion is made for a ſerjeant at arms, the perſon moving has the commiſſion of rebellion in his hand, ſo when a ſequeſtration is moved for after a ſerjeant at arms returned, then the gentleman who moves ſhould have the return of the ſerjeant at arms in his hand, and therefore the ſuppoſition of law is, that all theſe are returned and filed before the ſubſequent proceſſes iſſue.

But as the queſtion has not been determined before, I will refer it to a Maſter to certify the practice of the court.

But then it has been ſaid, all this is cured by what the defendant has done afterwards, and that an irregularity in proceſs may be cured by the ſubſequent proceedings.

The firſt anſwer was filed after the cauſe was ſet down on ſequeſtration, and even after *the decree pro confeſſo*; but the court let him in upon the taxation of coſts before the Maſter, who was attended by the ſolicitors on both ſides: and it is certain this irregularity may be cured, as well as an irregularity by *ſubpoena* may be cured by the defendant's appearance.

It

It was strongly litigated in *Whittington* versus *Charlton* (1), which was a case of appeal of murder, that the party appearing had cured an irregularity in the mesne process; three Judges, *Parker*, *Powis*, and *Eyre* were of this opinion, Mr. Justice *John Powell* of a contrary opinion.

I do not know that any court of common law has gone so far as to say, that if there is any irregularity in the proceedings where judgment has been obtained by default, they will not let the defendant in to contend upon the merits notwithstanding.

No court of common law has gone so far as to say, if there is any irregularity in the proceedings on a judgment by default, they will not let the defendant in to contend upon the merits.

The defendant, as I said before, applied to the court upon a former petition to set aside these proceedings, and as there was no affidavit, his petition was dismissed, but he was allowed to go before the Master on taxation of costs.

Shall such an allowance be sufficient alone to debar him from entering into the merits? All this depends upon the first question, whether it is an irregularity or not, for if there is no irregularity, he will not be intitled to enter into them, and therefore Lord *Hardwicke* referred it to a Master to inquire into the irregularity, and to certify it to the court.

Mr. *Noel* cited *Henriques* versus *Pereira* in 1722, where, after *a decree pro confesso*, the defendant was permitted to open the cause again upon an irregularity in the proceedings on *mesne process*, on the part of the plaintiff. Lord *Hardwicke* directed it to be looked into.

(1) 1 *Stra.* 155 S. C. *cited* 2 *Stra.* 989.

Pyncent versus *Pyncent*, *October* 24, 1747. Case 216.

A Bill was brought by a son against a father, where the plaintiff is only a remainder-man in tail under a settlement, made by his grandfather, after the death of his father, tenant for life, without impeachment of waste, to have the title deeds brought into court, that they may be forth-coming for the benefit of all parties interested.

A son, a remainder-man in tail under a settlement made by a grandfather, in which the father is tenant for life, without impeachment of waste, prefers a bill to have the title deeds brought into court. *Lord Hardwicke refused to direct it, and said some third person, and secure place, agreed upon by the parties, would be a much properer depository than a Master.*

An objection was taken for want of parties, that annuitants of the son, upon the reversion, after the death of his father, should have been before the court, and likewise a daughter of the defendant, who is interested under a trust term for years, prior to the limitation to the plaintiff.

PENCENT v. PENCANT.

The relief prayed, the first of the kind, such applications have been made against a jointress, and on the remainder man agreeing to confirm her jointure, the court have done it, or where remainder man has been a stranger to tenant for life, it has been done, but not in this instance.

LORD CHANCELLOR,

As to the relief prayed, it is the first I ever saw of the kind; such applications have been made against a jointress by a remainder-man, and upon agreeing to confirm her jointure, the court have done it (1), or where the remainder-man is a stranger to tenant for life, it may have been done, but not where it is under a settlement made by a grandfather (2), the father is made tenant for life without impeachment of waste, and the son remainder in tail only, reversion in fee to the grandfather, indeed, if there was evidence that the father was destroying of deeds, in order to better and enlarge his estate, the court might then take care to put the deeds out of his power.

But the court in general is not very inclinable to direct title deeds of a family, which are often very numerous, to be deposited in a Master's hands, because, they being subject to mortality, the deeds are very often lost and mislaid, to the great detriment of families, and therefore I should think some third person, and some place agreed upon by all parties, would be a much properer depository upon such occasions.

However, as the annuitants are not before the court who have an equitable charge upon the estate, nor the daughter who has an interest in the estate under the trust term, they are concerned in the title deeds, and therefore if the plaintiff was right in his application in other respects, I cannot do it till the annuitants are first heard, and the objection consequently for want of parties must be allowed.

[572] Another relief is prayed, that the trustees under the grandfather's settlement might execute a legal conveyance to the plaintiff, pursuant to the terms of the trust.

LORD CHANCELLOR,

The trustees may very properly say, as the annuitants are not before the court, if we should convey to the son with notice of these equitable charges, we shall be guilty of a breach of trust, and liable in our own persons; for as there is as yet no conveyance of the legal estate by trustees, and they have notice now of the son's incumbrances, they cannot safely do it.

(1) *Petree* v. *Petree*, *ante* 511.

(2) *Vide Lee* v. *Lee*, *ante* 1 vol 431. *Smith* v. *Coney*, *ante* 382.

Case 217. *Anonymous, October 24, 1747.*

Any one bond creditor may bring a bill against an executor for a discovery of assets, and for satisfaction, as the court decrees [illegible] an account, and directs the executor to pay, to whom he thinks fit, in course of administration.

WHERE a bond creditor brings a bill against an executor for an account of assets, and for satisfaction, it is no objection, for want of parties, to say, he has not brought other bond creditors, or creditors of a superior nature before the court, for any one bond creditor may bring his bill, as the court decrees only an account, and directs the executor to pay in the course of administration; and then the executor before the Master may set forth as he is conusant of the state and condition of his testator, what debts are prior to the plaintiff's, which he is obliged to pay, as having a legal preference.

Sibley versus Cook, October 27, 1747. Case 218.

A Bill was brought by the executor of *Ann Hume*, in order to have the direction of the court as to the payment of the *residuum* of her estate, she *inter alia* devised in the words following; "I give and devise the several legacies and sums following, "which I will shall be paid to the several persons herein-after nam-"ed, *and that if any of those persons should die before the same become* "*due and payable, I will that they, or any of them, shall not be deem-*"*ed lapsed legacies*;" then she particularizes the several legatees, and says, "to *Ann* the wife of *Richard Wensley*, and to her "executors or administrators, I give the sum of fifty pounds."

A. H. gives several legacies, and declares, that if any of the persons should die before the same become due, that they shall not be deemed lapsed legacies; and then says to Ann the wife of Richard Wensley, and to her executors or administrators, I give 50 l. she died in the testatrix's life-time, and her husband administred to her: Lord Hardwicke held it not to be a lapsed legacy, and decreed it to the husband.

Ann Wensley died in the life-time of the testatrix, and her husband administred to her.

A collateral question arose in this cause, whether this is a lapsed legacy? [573]

Mr. Solicitor General, counsel for the husband, cited *Darrell* versus *Molesworth*, 2 *Vern.* 378. as a case in point; "There divers legacies were given by a will, and it was directed by the "will that if any legatee died before his legacy *was payable*, it "should go to his brothers and sisters; a legatee died in the life-"time of the testator; It was adjudged it was no lapsed legacy, "but shall go to his sister."

LORD CHANCELLOR,

I am of opinion this is not a lapsed legacy.

If a man devises a real estate to *J. S.* and his heirs, and signifies or indicates his intention, that if *J. S.* die before him, it should not be a lapsed legacy, yet unless he had nominated another legatee, the heir at law is not excluded, notwithstanding the testator's declaration. So in the devise of a personal legacy to *A.* though the testator should shew an intention, that the legacy should not lapse in case *A.* die before him, yet this is not sufficient to exclude the next of kin (1).

If a man devises his real estate to J. S. and his heirs, signifying his intention, that if J. S. die before him, it should not be a lapsed legacy, the heir at law is not excluded, unless the testator nominates another legatee.

But here, in case *Ann Wensley* dies before the testatrix, she expressly provides against the lapsing, for she says, *if any of these persons die before the same become due or payable, I will that they or any of them shall not be deemed lapsed legacies*, and, subsequent to this, devises to *Ann, and to her executors and administrators* 50 *l.* so that in case of her death before the testatrix, other persons are named to take (2), which distinguishes it from the case I put before; and in *Darrell* versus *Molesworth*, the court laid

(1) *Vide Elliot* v. *Davenport*, 1 P. W. 86.

(2) *Bridge* v. *Abbot*, 3 *Bro. Cha. Rep.* 224.

Sibley v. Cook.

a stress upon the words *was payable*, which is very much the same with the present, *become due or payable*.

And upon the authority of this case, Lord *Hardwicke* decreed the legacy to the husband (1).

(1) *Reg Lib* B. 1747. fol. 172.

Case 219. *Nicholls* versus *Leeson*, *October* 28, 1747.

Where an annuity is given to a [illegible] for life, and it has been paid for any length of years without any deduction for the land tax, it will be presumed to have been so paid by mutual consent, and the prayer is not intitled to be relieved.

A. By his will gives an annuity of fifty pounds each, to his brother and sister-in-law, for their respective lives, out of his two shares in the *New river* Company, and charges these shares, and the rents and profits, with the payment of them.

[574] The bill is brought by the husband of the sister, for the arrears and growing payments of the annuity of *fifty pounds*.

It has been constantly paid from 1728 to the 15th of *May*, 1744, without any deductions, but the defendant insists now it is liable to a proportion of the land tax, and that he will not pay the growing annuity unless the plaintiff will account backwards, by allowing for the sixteen years past the land tax, and take this in part payment of the annuity.

The plaintiff's counsel said, there was no ground to go any further back at law than the statute of limitations, but that this court will not go back so far, and is exactly within the rule laid down in *Aston* versus *Oriel College*.

Here it is the case of a particular person, who has nothing else for maintenance, and must starve if she is to refund.

Mr. Attorney General for the defendant.

Persons are intitled to be relieved against a mistake in law and equity, as well as a mistake in fact.

It is not said to be given for maintenance, nor could there be any natural affection between the testator and the annuitants, therefore are mere volunteers, nor is it charged by the bill that they want it for maintenance.

In *Aston* versus *Oriel College*, a tenant had for several years paid the rent to the college, without retaining the land tax, and brought his bill to be relieved against this payment as being founded on a mistake, and it was insisted that he was not liable to the land tax.

There the court would not relieve, because, by such an allowance, the college would have injured their successors.

Lord Chancellor,

There is no just ground to decree back an account of these arrears, or a refunding, and it would be of mischievous consequence to do it.

It is not said by the will, for her maintenance; but where a testator gives so small an annuity to a relation for life, the thing speaks

ſpeaks itſelf that it was given for maintenance, or to improve her way of living.

Strictly it is ſubject to the land tax, though the party giving does not imagine ſo at the time.

There was no impoſition or fraud of the plaintiff on the defendant; if it is a miſtake, it is equally ſo on both ſides.

In the caſe of *Oriel College*, the court mentioned its being a fluctuating body, which, to be ſure, ſtrengthens it; but they went in general upon this, that where it was a payment of long ſtanding, and there was no fraud, the party receiving is ſuppoſed to have ſpent it in his maintenance, and therefore it would be very hard to make him refund what is no longer forth-coming.

In the caſe of *Brazen-noſe college*, they were plaintiffs, and yet the court made the ſame decree as in *Oriel college*, and did not oblige them to refund the money they had received of the tenant beyond the taxes.

If this annuity had been charged on lands by way of rent-charge, and there had been a liberty of entering and diſtraining for the arrears, it would not have been ſo ſtrong a caſe, but here the plaintiff could have no other remedy than bringing a bill in this court; for how could ſhe have come at it by diſtreſs, for ſhe could not have diſtrained upon the water, nor the company's goods, as ſhe had no right of entry, and therefore was under a neceſſity of coming here.

I go upon the reaſon of other caſes, and on this general rule, that where the annuity is given to a relation for life, whether it is expreſſed for maintenance or not, if it has been paid for any length of years, and no deduction has been made on account of the land tax, nor was it owing to any fraud or impoſition on the receiver, I will preſume it has been ſo paid by the mutual conſent of both ſides, and if there ſhould ariſe any quarrel between the payer and receiver afterwards, the payer is not intitled to be relieved.

Lord Hardwicke decreed (1) the plaintiff to be intitled to the growing payment of her annuity, ſubject to the land tax, for the future (2), but declared that the defendant was not intitled in this court to have any deduction in reſpect to the land tax, for any time precedent to the time during which the preſent arrears have incurred (3).

(1) "That the maſter in taking the "account of the arrears of the annuity "from 1744 ſhould make an allowance "of the land tax *from that time*."

(2) *Vide Hodgworth* v. *Crawley*, ante 2 vol. 376. note 1.

(3) *Reg. Lib.* B. 1747. fol. 102.

Case 220. *The Attorney General* versus *Parker, Price and Doughty, Michaelmas Term*, 1747.

LORD CHANCELLOR,

S. C. [illegible] 43. Where [illegible] was [illegible] to [illegible] right of election to a curacy, and not examined into, or proved, the court would not make any decree, but dismissed the information with costs.

THERE are several parts of relief prayed by this information; first, to set aside the election of Mr. *Doughty* to the curacy of *Clerkenwell*; and secondly, to establish the right of election; in order to this several questions have been made at the bar.

The first was, As to the election of Mr. *Doughty*, and the assembly in order to it, and a piece of unfairness was objected [illegible] the notice of election given in *February*.

The second question was, As to the right of election.

The third question was, If Mr. *Doughty* was elected according to that right.

As to the first, I think the notice in *February* was a fair and legal one; and as to the [illegible], that it being only on the *Sunday*, the very day before the election, I am of opinion they did right to refuse it, and therefore they may be laid out of the case, which brings it to the merits out of which all the rest must arise.

First, In whom the right of election is, and what are the qualifications of the electors, and this tends to the general point of establishing the right, by a decree of this court, and also to the question in regard to Mr. *Doughty*.

And as to the third, it will depend upon the words of the deed of trust, executed by Mr. *Drake* in 1656, and also upon the [illegible] in the point explanatory of the deed, and putting a general construction upon it.

It appears to have been *a rectory impropriate*, of the monastery of *Clerkenwell*, and that there was a perpetual curacy arising out of it of four pounds a year to the curate; whether this was an ancient pension, or created by King *Henry* the Eighth, after the dissolution of monasteries, which was very frequently done, does not appear.

It was given by Mr. *Drake* for the use of the parishioners and inhabitants for ever, and nothing is said of the curacy, but to be sure is consequent to the trust of *the rectory impropriate*.

When the grantor of a rectory impropriate originally in a monastery, grants it to a parish, they have the nomination, and the trustees must present pursuant to it.

As in one case the monastery were perpetual rectors, and the grantor in the other after the dissolution, when this is granted to the parish, they have the nomination, because they have the beneficial interest, and the trustees must present pursuant to their nomination.

Just

Just as if it had been a grant of an advowson of a presentative living, the parish would have the right of nomination to the trustees, and they must have presented such person so nominated.

Parishioner is a very large word, takes in, not only inhabitants of the parish, but persons who are occupiers of lands, that pay the several rates and duties, though they are not resiant, nor do contribute to the ornaments of the church.

The word parishioner takes in no only inhabitants of the parish, but occupiers of lands that pay rates and duties.

In [illegible] takes in housekeepers, though [illegible] also persons who are not housekeepers [illegible] who have gained a settlement, [illegible] become inhabitants.

The word inhabitants takes in housekeepers tho' not rated, and also such who have gained [illegible] *and so become inhabitants, tho' not housekeepers.*

[illegible] to have been [illegible] and in the construction [illegible] there is no better way of construing [illegible] and *contemporanea expositio* is the best [illegible].

With respect to ancient grants and deeds, there is no better way of construing them than by usage, and contemporanea expositio is the best rule to go by.

It [illegible] that it is confined to *substantial* [illegible] to persons paying to [illegible], and by the defendants, that it extends to all *housekeepers* in general.

If it had stood without any kind of restriction at all, I cannot say the limitation of the relators would have been an unreasonable one, and I was of that opinion in the case before me of the *Attorney General* versus *D*[illegible], after *Trinity* term 1741. 2 *Atk.* 213. It arose in *Devonshire*, and there I thought the inhabitants ought to be restrained to persons paying [illegible], that was a grant under a charter of the crown in *Edward* the Sixth's time.

But if there is an evidence of housekeepers constantly voting in this parish, it ought to prevail.

Consider too the time of the grant, *the independent congregational scheme* prevailed then, and therefore it must be supposed the donor had an intention to make the right of election as liberal as possible, and all housekeepers who were not rated, as well as rated, have voted in former elections.

In a matter that depends upon tradition, the evidence of ancient persons is properly admitted.

It was proved also at the election, that all the four candidates signed a paper, in which was the following agreement, that the poll should begin that day, and *all* housekeepers shall poll.

It is very extraordinary they should agree, if they did not think it to be right.

It is expressly sworn that this paper was read publickly to the assembly, and universally agreed to in the vestry before the poll began.

Can

ATTORNEY GENERAL v. PARKER.

Can there be a ſtronger evidence of what was the right in the pariſh, than ſuch an unanimous acquieſcence previous to the election?

In all theſe caſes evidence of ancient perſons is conſtantly admitted as proper evidence, becauſe this muſt depend a good deal upon tradition.

Then how is it poſſible for me to decree it to be only in houſekeepers paying *ſcot and lot*; it would be putting an arbitrary conſtruction of the court, which I am not empowered to do.

Mr. Attorney General ſays, ſelect veſtries in this pariſh, and only houſekeepers paying *church and poor*, have a right to be preſent and vote there; but in the interrogatories, no queſtions are aſked, what is the right of election, and is not at all to be governed by what is the right of veſtry in this pariſh, for a perſon may grant in ſuch a manner to a pariſh as not to be affected at all by the veſtry.

The ſelect veſtry has been ſet aſide here for 30 years, and laid open ever ſince; but ſuppoſe there was *a ſelect veſtry* at the time of the grant *de facto*, yet it is not in any reſpect to be governed by it, but upon the foot and words of the truſt.

Next, as to the election of Mr. *Doughty*, if according to the right, there is no doubt of it; but ſuppoſe it was not according to the right of election, Mr. *Doughty* on the poll had a majority of 286, and on the ſcrutiny they have gone into no proof as to the merits of the election, or how the majority ſtood upon the right of the election: and therefore if it had been in the houſekeepers paying church and poor, I could not ſet aſide the election, as they have not gone into the proof upon the merits, nor turn Mr. *Doughty* out as he is in poſſeſſion.

[579] Next, as to eſtabliſhing it for the future in ſuch limited houſekeepers, there is no ground for that, there is no general allegation what is the right of election, but is only incidental in Mr. *Doughty*'s particular election, nor is there ſo much as an interrogatory framed for this purpoſe.

Lord *Hardwicke* gave general directions to the regiſter to frame an order, to prevent applications to the court to withdraw the plaintiff's replication with a view to ſet down the cauſe on bill and anſwer only, and by that means get the bill diſmiſſed with coſts according to the courſe of the court only.

Therefore I cannot make a decree to eſtabliſh the right of election, which has not been examined to, nor alledged nor proved; but if I could go ſo far as to make ſome ſort of decree, ought I to direct an iſſue to ſettle a right which may not come in queſtion again in 40 years, for Mr. *Doughty* may continue curate ſo long? this would be abſurd.

The whole information was diſmiſſed with coſts.

In *Michaelmas* term 1747, Lord Chancellor mentioned *the cauſe of Potts* verſus *Reynell*, and gave directions to the regiſter to frame a general order, which might for the future prevent applications to the court to withdraw the plaintiff's replication, in order to ſet down the cauſe on bill and anſwer only, and by that means get the bill diſmiſſed with coſts, according to the courſe of the court, whereas otherwiſe he muſt have paid the defendant his full coſts. But his Lordſhip would not make any order that ſhould affect this particular cauſe at the hearing.

N[illegible]man versus *Aul[illegible]g*, *November* 9, 1747. Case 221.

A Bill was brought for the arrears of an annuity of 30*l.* a year given to the plaintiff and her late husband (1) during their joint lives, and to the survivor, and secured by a bond in the penalty of [illegible]00*l.*

A bill for the arrears of an annuity of 30*l.* secured by bond in the penalty of 500*l.* to account [illegible] of the arrears due since the year 1741, and interest [illegible] *per cent.* to be computed at the end of each half year.

The defendant was devisee of the real and personal estate of the donor (2).

[illegible] decreed an account of the arrears against the defendant, which were due ever since the year 1741, and interest [illegible] *per cent.* to be computed at the end of each half year (3), [illegible] this [illegible] given by way of maintenance, and [illegible] bond with a penalty for securing the payment, the plaintiff was clearly intitled to interest upon the arrears, for the court [illegible] have gone further where [illegible] annuity has been given for maintenance, and decreed interest, though it [illegible] only a bare simple grant of an annuity without any power of entering, if charged upon real estate, and in arrear, [illegible] secured upon a penalty to enforce the payment or performance [illegible].

As this was given by way of maintenance, and a bond to secure the payment, the plaintiff is clearly intitled to interest, for the court have gone further in an annuity given for maintenance, and decreed interest, though it was only a bare simple grant of an [illegible], [illegible] any power of entering, if in arrear.

[*580]

(1) By her [illegible] of her [illegible] and [illegible] of the survivor, and [illegible] bond.

(2) Wh[illegible] with the payment of his debt.

(3) *Reg[illegible]* B[illegible] 46 *[illegible]* v. *[illegible]*, *[illegible]*. *Ba[illegible]* v. *E[illegible]*, 2 *P. W.* 1[illegible]3. *Ferrers* v. *F[illegible]r*, *Ca. temp. Talb.* 2. *The Drapers' C[illegible]* v. *Davis* and 2 Vol. 211. *Ro[illegible]* v. *Cumming*, *ibid.* 411. *Morris* v. *D[illegible]le*, [illegible] 1[illegible]0. *Anon.* 2 *Ves.* 661. *[illegible]* v. *Earl of Win[illegible]ton*, 3 *Bro.* [illegible] 489. *Ves. jun.* 451. S. C.

S[illegible]thorp versus *M[illegible]on*, *November* 10, 1747. Case 222.

S. C. 1 Ves. 49.

THE question in this case was, whether a legacy should be deemed to be lapsed, and sink into the inheritance for the benefit of the heir, or go to the representative of the legatee.

The plaintiff's grandmother says by her will, I like[illegible] forgive my son-in-law *Richard Chillingworth* a debt of 500*l.* due to me upon bond, and desire my executor to deliver the [illegible] to be cancelled. The legatee died in the lifetime of the testatrix. *The plaintiff, his representative, ought to have the benefit of the discharge of the debt, and the court ordered the bond to be delivered up to be cancelled.*

The testatrix, the grandmother of the plaintiff, devised in the following words: I *likewise* forgive my son-in-law *Richard Chillingworth* a debt of 500*l.* due to me upon bond, and all interest that shall be due for the same at my decease, and desire my executor

SIBTHORP v. MOXOM.

ecutor to deliver up the bond to be cancelled, and made her ſon *John Perry* ſole executor.

The legatee died in the life-time of the teſtatrix.

Mr. Attorney General for the plaintiff argued, that this was an extinguiſhment of the debt, and ſhould enure to the benefit of the repreſentatives of that perſon whoſe debt it was, and diſtinguiſhed upon the force of the words, *I give, or I forgive*; a difference that was taken in the caſe of *Elliot* verſus *Davenport*, reported in 2 *Vern.* 521. and alſo in 1 *P. Wms.* 83.

The reaſon, he ſaid, of the word *alſo* being introduced in this clauſe was, becauſe ſhe had before given 10 *l.* a piece to the legatees for mourning.

Mr. *Brown*, counſel of the other ſide, ſaid, the true queſtion is, if this deviſe be of a legatory nature, or to operate by way of extinguiſhment.

It does not certainly amount to a releaſe of the debt, becauſe it does not take place till the death of the teſtatrix.

A will cannot releaſe a debt, 1 *Vent.* 39. 1 *Sid.* 421. the legatee alſo muſt be *in eſſe* capable of taking at the death of the teſtatrix.

The legatee pointed out in the preſent caſe is *Richard Chillingworth*, not his executor or adminiſtrator; it was a perſonal
[581] bounty to him, and coupled with the pecuniary legacy of ten pounds, ſhe had given him before.

Mr. *Wilbraham*, counſel of the ſame ſide, argued, that as to the words directing the bond to be delivered up to be cancelled, they ſtop too ſhort, they ſhould have gone ſo far as to ſay it ſhould be delivered up to the legatee, his executors or adminiſtrators, that would, he agreed, have been ſufficient.

LORD CHANCELLOR,

I am of opinion the plaintiff ought to have the benefit of this diſcharge of the debt, and that the bond ſhould be delivered up to be cancelled.

The teſtatrix had in contemplation, ſome benefit to all the branches of her family, the daughter of *Richard Chillingworth*'s wife is the perſon who now applies for this benefit, and it would be hard to ſay that becauſe the ſon-in-law died in the teſtatrix's life-time, that the grandaughter, who was of the teſtatrix's blood, ſhould loſe it.

Where a teſtator forgives a debt, it will not be good againſt creditors, but againſt an executor it may.

To be ſure where a teſtator gives a debt, or *forgives* a debt, it is a teſtamentary act, and will not be good againſt creditors, but againſt an executor it may.

If an action had been brought on the bond, this court would have granted an injunction.

And though this cannot operate as a releaſe at law, yet equity will carry it that length, and if an action had been brought on the bond, this court would have granted an injunction, or an original application might be made to this court; if ſo, what operation will it have in the preſent queſtion.

In

Sibthorp v. Moxom.

In the case of *Elliott* versus *Davenport*,* had it been said, *I forgive* my son such a debt, and the bond had been ordered to be delivered up by the executor to be cancelled, it had been held a discharge (1).

There is nothing personal in the present case in the direction that the bond should be delivered up to be cancelled.

But it is objected, this is not an independent clause, but *ancillary*.

The question then is, what construction the court should put upon it. [582]

I think the testatrix intended *in all events* the bonds should be delivered up to be cancelled; if this was her intention, the case is clear, and would operate most for the benefit of her family.

In *Elliott* and *Davenport* the words are not penned as *forgiveness or remission*, there was no intention to release the recognisance till Sir *William Elliott* paid 150 *l.* thereout; but here is a clear intention to release the debt; there it was to be delivered up to Sir *William Elliott*; here in general to be cancelled.

There the right of action subsisted, which was the reason of that opinion; here it would be too nice to make such a distinction, and would narrow the bounty too much, intended by the testatrix to her family; and therefore I decree the bond to be delivered up to the plaintiff to be cancelled, but without costs.

N. B. It was agreed by all, that a will, designing to prevent the lapse of a legacy by the death of the legatee in the life of the testator, ought to be specially penned (2).

A will to prevent the lapse of a legacy ought to specially penned.

* *A.* devises to *B.* 400 *l.* which he owed her, provided that thereout he paid several sums to his wife and children, and the rest she freely *gave* to him, and directs her executor to deliver up the security, and not to claim any part of the debt, but to give such release as *B.* his executors, *&c.* should require. *B.* dies in the life-time of the testatrix; the Master of the Rolls, Sir *John Trevor*, decreed the legacies given out of the 400 *l.* to be paid, and the residue of the debt to the executor. *Elliott* versus *Davenport*, 2 *Vern.* 521.

(1) *Vide Toplis* v. *Baker*, 1 *Cox's P. W.* 16. note 2. 5th edit.

(2) *Vide Sibley* v. *Cook*, *ante* 572.

Williams versus *Longfellow*, *Easter Term* 1746, *before the Master of the Rolls*, *William Fortescue*, *Esq.* Case 223.

MARY *Bush*, a defendant, disclaimed generally as to all the matters in the bill; the plaintiff ought not to have replied to her answer; by doing so, and serving her with a *subpœna* to rejoin, she is intitled to have costs against him to be taxed for the vexation; otherwise where the disclaimer is to part, and the answer is as to another part.

If a defendant disclaims generally, and the plaintiff replies to her answer, and serves her with a subpœna to rejoin, she is intitled to have costs against him for the vexation.

Case 224. *Bulstrode* versus *Bradley*, *November* 7, 1747.

S. C. post. 592.

In decrees against a mortgagee on a bill for redemption, or against an executor to account, it is the course of the court to direct it without future words; and yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the Master, and they must bring such sums to account.

LORD CHANCELLOR, It is the constant practice of the court in decrees against a mortgagee, upon a bill for redemption, or against an executor to account, to direct it without future words, *videlicet*, to account for what they have received, or might have, if it had not been for their own default; and yet if the person decreed to account receive any thing subsequent to the decree, it is inquirable before the Master, and the defendants in each case must bring such sums so received to account.

Case 225. *Harding* versus *Cox*, *November* 21, 1747.

[583]

A plaintiff by a false suggestion, *that the cause was at issue only*, when it was in the Chancellor's paper for hearing, obtained an order at the Rolls, for liberty to amend his bill, the order discharged, and the cause put off till next term, on paying the costs of the day, that the plaintiff may have an opportunity of amending his bill.

THE cause being in *Lord Chancellor's paper for hearing*, the plaintiff petitioned the Master of the Rolls, that he might be at liberty to amend his bill, by adding a prayer, upon a suggestion *that the cause was at issue only*, and that the prayer was in the original bill, but omitted by negligence in the amended, and it was ordered accordingly.

The defendant moved, at the opening of this cause to discharge this order, as being obtained upon a wrong suggestion.

LORD CHANCELLOR,

I can take no notice of the original bill, for though it be still upon the file, it was not properly before the court, and therefore the order must be discharged, as being irregularly obtained, with twenty shillings costs, and his Lordship put off the cause till next term, that, upon paying the costs of the day, the plaintiff might have an opportunity of amending his bill.

Case 226. *Leigh and others* versus *Barry and others*, *December* 4, 1747.

"Trustees will bind themselves to be liable for the act of each other as they have done here, the court will not relieve them, especially in the case of a composition of debts, as this

THE plaintiffs are creditors of one *James Randal*, and had effects of his in their hands; he becomes a bankrupt, and the defendants are chosen assignees under his commission; several disputes arising between the defendants and the plaintiffs in relation to *James Randal*, and suits depending on that account, they came to an agreement, that the plaintiffs shall retain as much from the produce of the effects of *James Randal* in their hands, as will answer them a composition of two shillings and six-pence in the pound for their debts, and shall account for the overplus to the defendants.

A deed

LEIGH v. BARRY.

A deed was executed for this purpose between the plaintiffs and the defendants, in which the plaintiffs *John Gibson*, *William Leigh*, and *George Westgarth*, did for themselves severally, and for their several and respective heirs, executors and administrators, covenant with each other, and the heirs, executors and administrators of each other, that the above agreement shall be good and valid, and that they will perform the same on their respective parts.

[584]

And afterwards in the covenant for carrying the agreement into execution, the words of the second covenant were, They do, and each of them doth covenant, promise and agree with the defendant *Thomas Barry* and *Richard Parker*, their executors and administrators, that they will pay the overplus, &c. (1).

Joseph Gibson, one of the covenantors, did alone receive the money for the sale of *James Randal*'s effects, and the others only joined in the receipt to the purchasers.

Gibson is become a bankrupt, and no payment has been made to the defendants the assignees.

The defendants, the assignees of *James Randal*, brought three several actions of covenant against the plaintiffs, upon which the plaintiffs brought a bill here for an injunction, which was granted on the usual terms of giving judgment with a release of errors.

It was insisted for the plaintiffs, that they ought not to make good the deficiency occasioned by *Joseph Gibson*'s bankruptcy, as he alone received in the whole money arising from the effects of *James Randal*, and as trustees they could not avoid joining with *Joseph Gibson* in the receipt.

LORD CHANCELLOR,

In the case of trustees though there are not *negative* words in a deed, *that they shall not be liable for the acts of one another*, yet this court will not make them liable for more than each has received.

Though there are not negative words in a deed, that trustees shall not be liable for one another's acts, yet the court will not make them so for more than each has received.

The court has even gone further; for where they all join in a receipt for money, it will make that trustee liable only who received it, for they are all obliged to join in the receipt, otherwise as to the executors, for there is no necessity for their joining, but may act severally if they think fit (2).

If they all join in a receipt for money, the court will make that trustee liable only who received; otherwise as to executors, because they need not join.

(1) There was a [illegible] power of attorney to [illegible] dell, 21 Vin 534 pl. 9. *Ex parte Belchier*, Amb 219 *Knight* v. *Truelove*, Amb. 417 *Westley* v. *Clarke*, 1 Cox's P. W. 83 note 241.

(2) As to this distinction between the receipts of *trustees* and [illegible], see *Fellows* v *Mitchell* [illegible] v. *Hobson*, ibid 241. [illegible] v [illegible], Pre. Cha. 173. [illegible] *Sadler* v *Hobbs*, 2 Bro. Cha Rep 114 *Lockhart* v *Gascoyne*, 3 Bro Cha Rep 73. *Scurfield* v. *Howes*, ibid 90 *Keble* v *Thompson*, ibid. 112.

But

Leigh v. Barry.

But if the trustees will bind themselves to be liable for the acts of each other, the court will not relieve them.

In the present case they are not bare trustees, but interested as creditors of *James Randal*.

The first is a several covenant, for they do for themselves severally covenant with each other, and for the heirs, executors and administrators of each other.

[585] Afterwards in the special covenant for carrying the agreement into execution, it is plainly joint and several, for it is, they do, and each of them doth, covenant, promise and agree with *Thomas Barry* and *Richard Decker*, their executors, *&c.* that they will pay the overplus, *&c.* and it was for the convenience of the trust, that they had a joint and several power.

Another reason that makes them each liable for the other is, that this is a composition of debts, and if good at law, unless fraud or mistake appears in the composition, there is no instance of this court's relieving against it.

The deed, besides, recites there were suits depending, and a demand upon the plaintiffs, on account of *James Randall*, the bankrupt, and allows them to retain what they had in their hands, to answer them a composition of two shillings and sixpence in the pound, upon entering into the agreement and covenants in the deed.

If there be an agreement to pay the compounded sum at a day certain, and the person fails, he must pay the whole debt to the creditor, for this court will not relieve.

This court has been so strict in regard to compositions, that if there be an agreement to pay the compounded sum at a day certain, and the person fails of paying it at the time, they will not relieve him, but he must pay the whole debt to the creditor.

Lord Chancellor decreed the plaintiffs should be charged jointly, to make good the deficiency of *Joseph Gibson*, and to pay the defendants the costs at law, and the costs in this court, so far as it relates to the relief sought against the joint covenant contained in the deed of the 27th of *February* 17 1/1 (1).

(1) *Reg. Lib* B. 1747. fol. 103.

Case 227. *Banks versus Denshaw and others, December* 9, 1747.

A testator says in his will, I give all and every my free hold and copyhold messuages to *A.* and *B.* (having surrendered the copyhold part thereof to the use of this my will). He had two copyholds, one of which he had surrendered, the other not. *It being clearly his intention that both should pass, and being a devise to a younger child totally unprovided for, the court directs the heir at law to surrender it to the same uses as were declared by the will* (1). S. C. 2 *Ves.* 63.

A Question arose in the cause, whether the court would supply the want of a surrender of some part of copyhold lands belonging to the father, in favour of the plaintiff, a younger child? The father, who was the testator, having two copyhold estates, one of which he had surrendered to the use of his will, and the other he had not.

(1) See *Hawkyns v. Leigh, ante* 1 vol. 387. and notes.

It

It was argued, for supplying the want of the surrender, that the testator's intention was plain, that all his freehold and copyhold estates should be subject to the trusts of his will, under which the younger children claimed; and that the younger child being otherwise unprovided for, the court would support the intention of the testator as to the fund for answering this, and the other charges created by the will. BANKS v. DENSHAW.

On the other side it was argued, that the testator's having surrendered part, and thereby shewn that he was apprehensive of the necessity of surrendering his copyhold estates, that he intended should be subject to his will, to the uses of such will, excluded any argument from intention that the whole should pass, and rather favoured an argument that he intended no more should pass than he had surrendered; and the case of *Barker* versus *Barker*, before Lord *Hardwicke*, was cited, where part of the testator's estate, consisting of the King of *Bohemia*'s Head on *Turnham Green*, being copyhold, and the greatest part thereof lying in a manor where the testator had made a surrender to the use of his will, but the remainder a small part in another manor in which no surrender was, yet the court refused to supply a surrender in that case, though so apparently inconvenient and destructive to the estate. [*586]

LORD CHANCELLOR,

The court ought to supply the want of a surrender in the present case, the words of the will are as strong as can possibly be to shew the testator's intention, that the whole should pass; "Also "I give all and every my freehold and copyhold messuages to *A.* "and *B.* (having surrendered the copyhold part thereof to the "use of this my will)" which, being in a *parenthesis*, is but in the nature of a recital, and as such considered only as a mistake, and not descriptive of what the testator intended should pass, as was the case in *Barker* versus *Barker*, *December* 15, 1743 (1), which I very unwillingly determined as I did, the words there were *which copyhold premisses I have surrendered*; these were restrictive words, and bound the court to judge on what were surrendered.

Suppose the testator had in his will said, whereas I have surrendered my copyhold to the use of my will, now I do, &c. and there had been no surrender, it would have been supplied in favour of younger children, legatees, or of creditors.

Besides, in the present case, the subsequent part of the will puts the matter out of all doubt as to the testator's intention, if that was not sufficiently plain before, as he thought it was, where the testator goes on, but my will is, that the said copyhold part shall be subject to the payment of 400 *l.* due on a mortgage of part thereof, now this must be meant the whole copyhold part of his estate, because the 400 *l.* mortgage was on the part of the copyhold which was surrendered.

(1) *Ante* 8. S. C. 1 *Ves.* 63. 121. S. C. cited.

Banks v. Denshaw.

Upon the whole I am clear, on the the manifest intention of the testator expressed in his will, that the surrender should be supplied; and directed the heir at law, who was also the customary heir, to surrender the same to the same uses as were declared by the testator's will, but such surrender to be at the costs of the plaintiff (1).

[587]

(1) *Reg. Lib.* B. 1747. fol. 305.

Case 228. *Foster* versus *Vassall*, *December* 17, 1747.

To a bill brought against the defendant as an executor to account, he pleads a suit in the court of Chancery at *Jamaica*, brought against him by the plaintiff, with the like matter of complaint relating to the executorship: neither the term, nor even the year in which the suit was instituted, being set out for certain, there is not that averment which courts of law and equity both require in pleas, and as it was therefore defective in form, *Lord Hardwicke over-ruled the plea.*

THE bill prayed that the defendant *Vassall*, and the representatives of the other executors of the plaintiff's father, may account to the plaintiff, and that he may be paid what shall appear to be due, and that he may be quieted in the possession of those estates come to him by the death of his brother *John*.

To this it was pleaded, that the plaintiff and the defendant are natives of *Jamaica*, where both their estates lie, and both of them being resident there, the plaintiff, in or about 1745, brought his bill in the court of chancery there, against the defendant, as one of the executors of the plaintiff's father, and in his bill sets forth the like matter of complaint relating to the executorship, and guardianship, and the defendant's management and conduct of the estate, and sets up the like claim to the estate, and prays the like account, and the same relief, as are required and prayed by his present bill.

To which bill in *Jamaica*, this defendant, in 1747, put in his answer, with the account relating to the trust estate annexed; and soon after, in *August* 1745, quitted *Jamaica*, for the recovery of his health, and left his attorney there, to manage this suit, and his other affairs.

Issue was joined, and the same cause is still depending there.

The defendant refers to the record in *Jamaica*, as he has no copy of the proceedings there; and insists by his plea, that as all the matters and things lie there, he ought not to be sued for the same matters and things here, all the vouchers being in *Jamaica*, and the laws and customs there differ in many respects from those in this kingdom; and the defendant's estate lying altogether in *Jamaica*, and liable to be sequestered for the non-performance of any order and decree there, and being more than sufficient for that purpose, he therefore pleads the bill and answer, and proceedings there, to the discovery and relief now sought.

Mr. *Wilbraham*, in support of the defendant's plea, cited *Sparry's case in the Exchequer*, 5 *Co.* 61. there *Owen* brought an action on the case against *Sparry* of trover, of a certain quantity of cotton yarn, and selling it to persons unknown, and conversion to his own use; the defendant pleaded, that the plaintiff had another action on the case depending in the King's Bench for the same trover, and conversion of the same goods, and this suit is prosecuted pending the other: and it was resolved by Sir *Roger Manwood*, Chief Baron, and the whole Court of Exchequer, that the bill should abate; for, by the rule of law, a man shall not be twice vexed for one and the same cause, *nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa.*

He likewise cited *Wells and his wife* versus *The Earl of Antrim, December* 6, 1717, and *Otway* versus *Ramsay, Mich.* 11 *Geo.* 2. *in B. R.* (1) to shew that judgments obtained in the courts here extend not to *Ireland*.

He insisted, there is the same reason why the plantations should have the same power in their courts of equity, as the courts in *Ireland* have.

As to the inconvenience charged by the bill itself, that the inventory of the executor is filed at *Jamaica*, and that this court cannot by any method oblige them to bring it over; suppose a decree should be made there, all the books, papers and writings are then of course directed to be produced, in order to take the account; the same decree may be made here, and then we can only have copies of the books, *&c.* or there may be two contradictory decrees, which is the principal reason why the court will not allow of two suits for the same matter, depending at once in two different courts.

The court of *Jamaica* pays no more regard to the decrees of the court of *England*, than this court does to the sentences of foreign courts.

The inconvenience of entering into it here being so great, the convenience of determining it there so apparent, he insisted that the plea ought to be allowed.

The defendant has, besides, asserted in his plea, that he has a large fortune which is liable to be sequestered there, so that the plaintiff may have complete justice.

In answer to an objection thrown out by the plantiff, that the plea is not supported by proper averments, and particularly, that it does not aver the suit in *Jamaica* is still depending; Mr. *Wilbraham* cited *Urlin* versus ——— 1 *Vern.* 332, where the Master of the *Rolls* held, that there need not be a positive averment, that the former suit is still depending, for that is examinable by the Master.

LORD CHANCELLOR, [589]

If this plea had been well pleaded, it might have brought on a considerable question.

(1) 14 *Vin.* 569. S. C.

 The

FOSTER v. VASSALL.

Where the defendant is in England, though the cause of suit arise in the plantations, if the bill be brought here, the court does agere in personam, and may, by compulsion on the person, compel him to do justice.

The different courts of equity are held under the same crown, though, in different dominions, and therefore, considering this as a court abroad, the point of jurisdiction is the same as if in *Ireland*; and it is certain where the provision is in *England*, let the cause of suit arise in *Ireland*, or the plantations, if the bill be brought in *England*, as the defendant is here, the courts do *agere in personam*, and may, by compulsion on the person, and process of the court, compel him to do justice (1).

Suppose different suits are brought there, and here, what is to be done?

If the defendant does in an action in the court of King's Bench or Common Pleas, plead to it an action in the plantations, it will not bar the jurisdiction here.

I take it to be clear, if an action is brought in the courts of King's Bench, or Common Pleas, and the defendant pleads to it an action in *Ireland*, or the *Plantations*, they could not take any notice of it, nor would it bar the jurisdiction of the court here.

Though an action has been brought in Ireland on a bond, and sued to judgment there, you cannot plead to it an action here.

It has been determined, if an action be brought in *Ireland* on a bond, and sued to judgment there, you cannot even plead that judgment to an action in the courts here.

The rule with regard to pleas, is more liberally here exercised than at law.

The general rule of courts of equity with regard to pleas, is the same as in courts of law, but exercised with a more liberal discretion.

To be sure, two suits for the same matters in the plantations and here, may be attended with inconvenience, as Mr. *Wilbraham* has urged, and Lord *Cowper*, for that reason, in *Wells* versus *Lord Antrim*, went as far as he could, but I should not have been of opinion myself, to allow the plea there to the discovery.

Though in the case of Wells versus Lord Antrim, Lord Cowper allowed the plea to the discovery, Lord Hardwicke said, he should not have been of that opinion.

The plea to the jurisdiction is known here as well as at law, but it is not so as to pleas in abatement or bar, for the court here allow themselves a greater latitude as to circumstances, and in the order of Lord *Cowper*, there is a reservation for further proceedings here, if Lord *Antrim* should make it impracticable to proceed in *Ireland*.

It is said here, that in or about such a year, the plaintiff brought his bill in the court of Chancery of *Jamaica*, &c.

[590]

Not even the year is set out for certain, not so much as the term mentioned in which the suit was instituted, and set forth in general only, that his former bill prays the like account, and the same relief with the present.

(1) *Vide Roberdeau* v. *Rous*, *ante* 1 vol. 543. *Stribley* v. *Hawkins*, *ante* 275. *Penn* v. *Lord Baltimore*. 1 *Vef.* 444, 454. *Pike* v. *Hoare Amb.* 428. *Fonbl.* Treatise of Equity, 31.

This

This is pleading historically only, and upon his memory, without any averment or certainty, which courts of law and equity both require in pleas. FOSTER v. VASSALL.

It was said by Mr. *Wilbraham*, the defendant had no copy of the proceedings with him in *England*, and therefore could not plead it with more certainty.

But this will not make the plea at all the better, the defendant ought to have applied by motion, on this suggestion, for more time to plead or answer, but the court cannot by their rules allow this plea, as it is defective in form, and therefore his Lordship over-ruled the plea (1).

(1) *Vide Mitford's Pleadings*, 197.

Bell versus *Read*, *December* 17, 1765. Mr. Baron *Clark* sitting for *Lord Chancellor*. Case 229.

In *May*, 1745, a bill was brought against the defendants for tithes; the 28th of *April*, 1746, the cause was heard at the *Rolls*, and an account decreed and the defendants directed to pay what should respectively be found due: To a second bill for the same matter, the defendant pleads the first, and the decree. Mr. Baron *Clark* allowed the plea, as the defendant would otherwise be put to double expence, and double vexation.

THE plaintiff, as rector of *Blunsden* in *Wiltshire*, brought his bill against the defendants, as occupiers of lands in the parish, for the great and small tithes, and prays that they may come to an account with him for the tithes *which are due and payable to the plaintiff*, and that they may pay to him all and singular his tithes and duties for the future, as they shall accrue and grow due, as long as he continues rector there.

The defendants, as to so much of the bill as seeks any account or discovery of the tithes arising in *Blunsden*, at any time before the 28th of *April*, 1740, plead, that before the plaintiff exhibited his present bill, he did, in *May*, 1745, exhibit his first bill against the defendants for an account, and discovery of the tithes arising in *Blunsden*, and by that bill prayed, that the defendants might pay the plaintiff the full value of such tithes with which the defendants were chargeable, *and which should appear to be due to the plaintiff*, and also that the defendants might pay to the plaintiff *all his tithes for the future as they should grow due, so long as he continued rector of* Blunsden; and on the 28th of *April*, 1746, that cause was heard before the Master of the *Rolls*, and it was ordered to be referred to Mr. *Bennet*, to take an account of what was due to the plaintiff from the defendants, for all the tithes demanded by the plaintiff's bill, and that they should pay him what should respectively be found due from each of them. [591]

And in pursuance of the decree the plaintiff has left with the Master three distinct charges against the three several defendants, and examined witnesses in order to support his charges, and also exhibited interrogatories before the Master for the examination of the defendants, who have each of

BELL v. READ. them put in their several answers and examinations to the interrogatories.

And, in regard the plaintiff is by his present bill seeking the same relief and discovery as he sought by his former bill, and as is already provided for him by the decree, according to the usage of this court in cases of this nature, the defendants do therefore plead the former bill, answers, decree, &c. in bar to so much, and such part of the plaintiff's bill as aforesaid.

Mr. *Tracy Atkyns*, in support of the defendant's plea, said, that the second bill must either be brought for vexation merely, or proceed from ignorance, and want of knowing the practice of this court; for he apprehended there was a material difference between the decrees of the Exchequer for an account of tithes, and the decrees of this court, that there they are directed to the time of filing the bill only, but here to the time of the Master's report.

That Lord *Chancellor* seemed to be of this opinion in the case of the *Archbishop of York* versus *Sir Miles Stapleton and others*, *February* 21, 1740 (1); "That was a bill brought for "an account of tithes, and to establish the custom of setting "out corn in stacks; his Lordship directed an issue to try "the custom, and said, though it will be time enough to "search for precedents as to the manner of directing the "account, when the cause comes back after trial, yet he "took the difference between the course of proceeding in "the court of Chancery, and the court of Exchequer, to be "this, that there they direct an account of tithes no further "than the bringing of the bill, but here the rule of the court "in general is, where an account of tithes is decreed, that "it shall be carried down even to the time of the Master's "report, and not to the filing of the bill only."

Mr. *Tracy Atkyns* observed further, that the rule is the same in similar cases, where the account is to be taken, and that in
[592] the case of *Bulstrode* versus *Bradley* (2), *Michaelmas* term, 1747, Lord *Chancellor* was pleased to say, "It is the constant practice "of the court, in decrees against a mortgagee upon a bill "for redemption, or against an executor to account, to direct "it without future words; and yet if the person decreed to "account, receive any thing subsequent to the decree, it is "inquirable before the Master equally with sums received before "the decree."

That if this be the practice, the plaintiff, by the decree in the first cause, may carry the account full as far under the first suit, as he can under the second, and consequently the last is multiplying suits unnecessarily, without any advantage to the plaintiff, or answering any end, but what he has already, or might have obtained under the former decree.

Mr. Baron Clark,

(1) *Ante* 2 vol. 136. S. C. (2) *Ante* 582. S. C.

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The defendant's plea of a former suit depending for the same matter ought to be allowed (1), or otherwise the defendant may be put to double expence, and double vexation, as possibly if the second cause was to proceed, the decree may be different from the decree in the former suit. BELL v. READ.

As to the difference in practice between the two courts, the Exchequer and Chancery, it is undoubtedly such as has been insisted on by the defendant's counsel (2), and in decrees for account of tithes in the court of Chancery, they are not drawn up differently from decrees to account in other matters, but are general, to account for all tithes that are due, without specifying any particular time charged in the bill, or limiting the account to any certain determinate time.

Decrees for account of tithes in the court of Chancery are general, to account for all that are due, without specifying any particular period or limiting the account to a certain determinate time.

And, as according to the practice of this court, an account for tithes may be carried on as long as the suit is depending between the parties; it would be vexatious if the plaintiff should be allowed to proceed in a second bill for the same individual tithes; I ought therefore to allow the plea as to the particular period of time covered by it the 28th of *April*, 1746, the time when the cause was heard and decree made: and it was allowed accordingly.

(1) *Vide Mitford's Pleadings*, 197.

(2) So *Carleton* v *Brightwell*, 2 *P.W.* 463. *Archbishop* of *York* v. *Stapleton*, *ante* 2 vol 136 But in the case of *Newt* v. *Chamberlain* in the House of Lords, upon an appeal from the court of *exchequer*, it was ordered that the tithes should be continued to be paid *in future*. 1 *Bro. P. C.* 157. 1 *Eq. Ab.* 366. *pl.* 3. S. C.

Barnsley versus *Powell*, *December* 18, 1747. *The last Seal before Christmas.* Case 230.

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A Commission to examine witnesses in the cause issued in *August*, was executed in *September*, and continued till the 20th of *October*; an application was made by the defendant the beginning of *Michaelmas* term, for a new commission, which was offered to him by the plaintiff on terms, but was rejected.

If a commission be taken out in the vacation, and has not a certain return, it does not expire the first day of the following term, but may be continued in execution the whole of the next term, to the last return.

And now the defendant having lain by till the last seal after *Michaelmas* term, and after the cause is set down to be heard, moves that a new commission may be granted, and that he may be at liberty to exhibit interrogatories, and that publication may be enlarged to six weeks.

LORD CHANCELLOR,

I am willing to let the defendant have an opportunity of examining, that there may be no imputation of hardship.

It is sworn by the defendant's affidavits, that the commission was closed without *Mansell Powell*, or his solicitor knowing it.

BARNSLEY v. POWELL.

By the rule of the court, the plaintiff is first intitled to sue out the commission, and if the defendant has an opportunity of examining his witnesses, he is not intitled to a new commission; indeed, if the plaintiff neglects to sue it out, it may be done *ex parte defendentis*.

The evidence of the defendant does not come up to his being hindered in examining his witnesses; but, however, I am inclined, as far as I can, without manifest injustice, to let in the defendant to examine witnesses.

The plaintiff's commissioners were under a mistake in closing the examination the 23d of *October*, for if a commission in *England* be taken out in the vacation, and has not a certain return, but only *sine dilatione*, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return, and the defendant should have applied to have enlarged publication till the last day of the term; but notwithstanding his Lordship directed a new commission to be returned by the last day of *Hilary* term, and publication enlarged to the first seal after that term.

The next matter is, whether the defendant may be at liberty to exhibit new interrogatories.

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After the depositions have been seen under a former commission, the court will not suffer additional interrogatories to be exhibited under a new one, but confined the defendant to the proving exhibits and cross examining a person already examined for the plaintiff, but not to examine any new witnesses.

It is very dangerous to suffer additional interrogatories to make out new circumstances after the depositions have been seen under the former commission; and the court, besides, expects all the defendants should join in the application for new interrogatories; and therefore all the order I shall make in the present case is, that the defendant *Powell* be at liberty to exhibit additional interrogatories to the competency or credit only of Sir *Humphrey Howarth* already examined for the plaintiff, and also to prove exhibits, and likewise to be at liberty to cross-examine Sir *Humphrey Howarth*, but not to examine any new witnesses (1).

(1) *Reg. Lib.* A. 1747. fol. 68.

Case 231. *Hawkins* versus *Crock*, *December* 21, 1747.

Where a sequestration issues as a mesne process, it fails with the death of the person; but if for non-performance of a decree, the death of the party does not determine it.

A Commission of sequestration issued in 1728, against the defendant, for want of an answer; Mr. *Vaughan*, who was employed in the cause as solicitor for the plaintiff, made his own son commissioner, who now applies by petition to the court for an order upon the plaintiff, to pay him his fees as a sequestrator.

LORD CHANCELLOR,

It does not appear he has made any demand in 19 years, tho' the person against whom the sequestration issued died as long ago as 1734; neither does it appear what goods were sequestered, nor has any return ever been made, during all this time, of what

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Hawkins v. Croke.

was sequestered, and though he delivered over the goods in 1730, he made no demand.

If the plaintiff should ever call for an account of the goods sequestered, then the petitioner might set off for his fees, provided he has made a return from time to time of what he has seized under the sequestration: the petition was dismissed.

N. B. His Lordship said a sequestration, that issues as a mesne process of the court, falls with the death of the person, but where it issues for non-performance of a decree, the death of the arty does not determine it (1).

(1) Sed *vide Blith* v. *Earl of Darnley*, *Ves.* 182. *White* v. *Hayward*, 2 *Ves*, 2 *P. W.* 62. *Wharam* v. *Broughton*, 1 464.

Smith versus *Wilmer and others*, *December* 22, 1747. Case 232.

[595]

After original writs had issued under the seal of this court, they were altered and amended with the leave of the cursitor by the plaintiff's attorney, and then resealed; the defendant applies to supersede the writs on account of the rasures made in them after they were sealed: As the mistakes were merely literal or verbal, no grounds to supersede them, especially as the cursitors have declared it to be the course of their office, that when their clerks are guilty of mistakes in making out the original variant from the præcipe, they direct the plaintiff's attorney to set them right, where the mistakes do not affect the substance of the writ.

IN the month of *April* last, at the instance of *Alexander Smith*, the defendants underwrote the sum of 100 *l.* on the goods to be loaden on board the *Ghent* Packet, on a voyage from *Dort* to *London*, and in the voyage she foundered, and sunk with all her cargo; the defendants believing the ship was unfairly lost, refused to pay the sum insured; whereupon Mr. *Cracraft*, attorney for *Smith*, caused eleven special original writs to issue out of Chancery against the defendants, returnable in the court of King's Bench, and having sued out the same number of *capiasses ad respondendum*, returnable in *Michaelmas* term, held the defendants to special bail thereon, and on the 10th of *November* delivered three declarations against the defendants, and demanded pleas; and on the 16th of *November* the defendant's attorney having demanded *oyer*, and a copy of the several original writs, *Lilliot*, who is clerk to *Cracraft*, brought to their attorney on the 20th of *November* the three originals, and copies thereof, who discovered they had been altered in several places after they had passed the seal of this court; for upon examining the copies with the writs, he found there were several interlineations, rasures and writings upon rasures newly made in the writs themselves; and the defendants apprehending that the alterations were made by *Lilliot* under the direction of *Cracraft*, applied by petition to the court, that the several original writs may be brought here for Lord Chancellor's inspection, to make such order as he should think proper, and that they might have their costs they have been put to on this account.

It appeared by the affidavit of *Lilliot*, that three *præcipes*, agreeable to the declarations delivered to the defendant's attorney, were left with Mr. *Buxton* the cursitor, in order for him to make out the original writs conformable thereto, and that *Lilliot* afterwards went to Mr. *Richard Floyer*, who acts as deputy phi-

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lazer of the court of King's Bench, and asked him for them, who delivered them to him, and told him that Mr. *Buxton* had not time to examine the writs, and that if there were any mistakes in any of them, that *Lilliot* himself might alter and make them agreeable to the *præcipes*; that upon comparing and examining them with the drafts of the declarations, he found several mistakes, and particularly in several places where the policy of insurance was recited, some words were contracted, and wrote short, which were written at length both in the declarations and *præcipes*; and admits he did, by the permission and direction of *Floyer*, make several alterations in the writs, in order to make them agreeable to the *præcipes*, *before* oyer *and copies thereof were delivered to the defendant's attorney*; but there being some few mistakes overlooked after such alterations made, when the original writs were read over

[596] with the copies, (delivered to defendant's attorney) he rectified the same after *oyer*, and copies delivered, on the day they were so delivered; and that the mistakes were intirely owing to the cursitor's clerk who ingrossed the writs without examining the same with the *præcipes*, and that *Lilliot*, after he had made all the alterations in the original writs, went on the 20th of *November* to Mr. *Buxton* the cursitor, and acquainted him with it, who approved of it, and the writs were on that day left with the cursitor to be resealed, and were accordingly resealed the next day, *and are now agreeable to the declarations and to the* præcipes *left with the cursitor*, and that this was the true and only reason why he altered the same, and that there is no alteration in the return thereof.

Where an original writ issues from hence, and is altered, this court before th return have the cognisance; doubtful if they have after the return.

LORD CHANCELLOR,

I have great doubt whether I can properly enter into this matter, for though where an original writ issues out of this court, and is altered and erased, I might before the return, and while it is *in transitu*, have the cognisance, yet after it is returned, it is a record of the law court.

Mr. Attorney General, counsel for the petitioners, cited the case of the *Weavers' Company qui tam* versus *Hayward*, *June* 12, 1746 (1), which was a prosecution on the Callico Act, and held there, that altering the original writ after it had been sealed, was destroying the writ, and it was ordered to be superseded with costs.

In the present case the writ was altered after the return, and resealed after *oyer* had been prayed.

The copies of the writs were given to the petitioner's attorney by the plaintiffs as they stood originally, and thereupon the defendants made application to Mr. Justice *Wright* to make the declarations agreeable to the original writs, and afterwards for the like purpose to the court of King's Bench, who refused to do any thing in it, as it was a matter for the animadversion of this court.

The present application therefore is to your Lordship, to supersede the writs on account of the rasures and alterations made

(1) *Ante* 62. S.C.

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in them after their being sealed, and the question is, whether the plaintiff's attorney can alter it, or if it is not a sort of forgery upon the great seal, for the former writs had been made use of, returned by the sheriff, and declarations delivered pursuant to them, and as there are no double stamps upon them, fall exactly within the case of the *Weavers' Company* versus *Hayward*, for it is plainly a fraud upon the stamp act; they have besides not only rased them once to make them tally with the declaration, but amended them a second time, and all the alterations are before the resealing. SMITH v. WILMER.

Mr. *Cox* of the same side said, after use has been made of a writ, it is a record of the court, and cannot be varied or altered. [597]

Mr. *Brown*, counsel for the plaintiff at law, said, it is very well known that where special *capiasses* are sued out, the originals are not taken out till some time afterwards; the *præcipes* have never been altered, but only the originals made agreeable to them, and though the defendants put in a sham plea at first, they have retracted it, and have pleaded the general issue since.

It is insisted the writs ought to be superseded, because they had been altered after they had issued from the great seal; now nothing is more frequent than altering writs in things which are not material; and the revenue is not at all defrauded, because it is the *capiasses* only that are stamped; the case cited therefore differs from the present, because here the revenue cannot suffer.

Any alterations that vary *the teste*, or the *return*, or *the substance of the writ*, are not allowable; but an alteration may be made in immaterial parts, because that does not vary it in substance.

In the *Weavers' Company* versus *Hayward*, the alteration was thus; the attorney who took out the writ, left the old teste, and inlarged the return, which gave a new cause of action, and *that* the court would not endure; here nothing more has been done than only rectifying some verbal mistakes, owing to the negligence of the cursitor's clerk.

The originals are considered merely as things of form, for they have been taken out even after a warrant for entering up of judgment, and the return of them is indorsed by the attorney as a thing of course, and never come into the hands of the sheriff.

It is said the defendants might have taken advantage of it by pleading in abatement; but if they had, the court would have assisted the plaintiff in rectifying these variances between the originals and the *capiasses*; but as the defendants have pleaded now the general issue, they shall not be allowed to take advantage of a mere mistake in form to supersede a writ.

Mr. Buxton and Mr. Whitehead, two of the cursitors attending, *Lord Chancellor* asked them, what the practice of the office is, where there are original writs.

Mr.

SMITH v. WILKES.

Mr. *Buxton* said in things that are not material, as clerks are liable to mistakes, they have in an hundred instances directed the attorney's clerk to set it right.

LORD CHANCELLOR,

[598] Suppose an original writ is made out to warrant a special *capias*, and the attorney's clerk has altered the original writ to make it conformable to the *præcipe*, has this been justified?

Mr. *Whitehead* said, he always apprehended that in literal mistakes, and even where a word has been left out, it has been usual to supply it, and reseal it.

In the present case the word *enure* was altered to *endure*, and the word *detainment* to *determinatus*.

LORD CHANCELLOR.

The *præcipe* left with the filazer, is the warrant to the cursitor to make out the original, for the *præcipe* is transmitted by him to the cursitor, and in the notion of law precedes the *capias*, though in practice it is not made out till afterwards.

When this application was first made to me, I apprehended it had been an extraordinary behaviour in the plaintiff and his attorney, and that they had taken upon them to alter an original writ, without bringing it to be resealed.

No person after an original writ is sealed can alter it without bringing it to be resealed.

That would have been unwarrantable, for no body after sealing can alter it without bringing it to be resealed, or if it is such a mistake as is warranted to be amended by the cursitor, yet it shou'd be brought to be resealed.

But at the hearing it turns out not to be an alteration by the attorney himself, but by the cursitor, and the writ sent by him to be resealed.

The question is, whether this is irregular or not; a great many considerations arise, and some of a pretty nice nature: First, Whether it is in the power of this court now to supersede the writs.

If writs are altered after the return is out, and process issued upon them and filed in the court of King's Bench without having them resealed, it is under the cognisance of the judges there, and this court will not meddle with them.

If the writs had been altered after the return was out, and process had issued upon them, and filed in the court of King's Bench without having them resealed, I should not have meddled with them, but it would have been under the cognisance of that court, who might have set right a mistake where there was an effacing of an original, and restored the writs as they were before.

Original writs were at first commissional to the courts of common law, for without an original none of these courts had any power to hold a plea and a judgment where there there was no original was void; and all the jurisdiction the courts of common law have now is upon a presumption of privilege.

The second consideration will be, what is the nature and foundation of original writs? To be sure they were commissional to courts of common law, for without an original none of these courts had a commission to hold plea; and a judgment where there is no original is void, unless by reason of privilege; as in the court of King's Bench, where the defendant is brought there by bill of *Middlesex*, then he is in the custody of the marshal,

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and a prisoner to the court at the time, and consequently they have a privilege to retain him in that court.

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In the Common Pleas they proceed in the nature of a declaration *by the by*.

In the court of Exchequer they proceed upon a supposition, that defendant is *debitor Domini Regis*, so that the jurisdiction the courts of common law have, is upon a presumption of privilege, unless it is by original writ.

Though in judgment of law the original is supposed to be taken out before the *capias*, yet where the plaintiff has obtained a verdict he need not sue it out, for the statutes of jeofails cure the want of it.

Where the party proceeds upon a special *copias*, and takes out an original writ to warrant it, the plaintiff has this benefit, that the defendant must plead without imparlance: but all this is varied by practice and modern usage; for though the special *capias* is founded on the original, and supposes an original taken out first, yet it is otherwise in practice; and where they proceed upon a *latitat* in the court of King's Bench, or *clausum fregit* in the court of Common Pleas, they will commit an attorney for praying *oyer* of an original; and where the plaintiff obtains a verdict he need not sue out an original, for the statutes of jeofails cure the want of it; and yet in judgment of law the original is supposed to be taken out before the *capias*.

I only mention this, to shew how by the modern practice it is grown into mere matter of form.

The complaint before me is, that this original after it had issued under the seal of the court has been altered and amended, and then resealed, which it is insisted ought not to have been done.

The cursitors, Mr. *Buxton* and Mr. *Whitehead*, have certified in court that it is the course of their office, whenever a cursitor's clerk is guilty of a mistake in making out the original variant from *the præcipe*, (which is the cursitor's warrant for the original), on the plaintiff's attorney shewing the mistakes, to direct them to be set right, if they are only literal or verbal mistakes, without affecting the substance of the writ.

This is a very reasonable alteration, for it is not the mistake of the party, but *vitium clerici*; if the alteration were to vary it in substance, that would not be justified; but if I was to alter this practice in the office, the plaintiff must make a motion to amend the writs, (for undoubtedly they are amendable) and then there is no occasion to reseal them, for this court can certainly alter writs issuing from hence; but where the officer alters it, it is necessary to have the ratification of the court by resealing it. [600]

As it would put the parties to a great expence to alter it, I shall not set aside the practice of the cursitor's office, provided they do not exercise this power any further than they have hitherto done.

It has been said, this ought not to be done after the writs are made use of; the use that has been made of them in this case is, the writs are returned, and *oyer* delivered to defendant's attorney.

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The return of the original is mere form, for though made in the sheriff's name, it never goes to him, but indorsed by the plaintiff's attorney, "there is nothing in our bailiwick by which the defendant can be attached."

It is manifest this return is mere form, for though made in the sheriff's name, it never goes to him, but is indorsed by the attorney for the plaintiff, *that there is nothing in our bailiwick by which the defendant can be attached*.

Whether true or false, the defendant cannot be hurt by it; which shews these things are gone into mere matter of form, and therefore this will not prevent the cursitor from making these alterations.

It is just as much a form as the cursitor's indorsing on the writ *pledges to prosecute*; the next consideration is, as *to giving oyer*; this is a transaction which passes in the court of King's Bench, and therefore the cursitor's can know nothing of it.

If after oyer given the plaintiff had come into this court, and shewn a variance between the writ and *præcipe*, the court would have directed it to be set right.

Suppose after *oyer* given the plaintiff had come to this court and shewn a variance between the writ and *præcipe*, the court would have directed it to be set right, therefore this is not such a use of the writ as the law calls making use of it, what the law considers as a use of it is, a service of the copy of the writ on the defendant, to appear; which was done in the case of the *Weavers' Company* versus *Hayward*; the present is not any such use of the writ at law.

I will consider the precedent next, the *Weavers' Company* versus *Hayward*.

What induced me to supersede the writ there was, First, That it ought to have been stamped, for it had been altered in the return without being stamped anew; and if once it has been made use of, the act of parliament relating to the stamps requires it to be new stamped, or otherwise it cannot be resealed.

[601] Secondly, It was a popular action by a common informer on the Calico Act, and the time limited for bringing the action upon the statute had been expired; and as the alteration of the writ was erroneous, and could not be served again, because the return was out, they therefore resealed the writ but let the old teste stand, (that being within the time limited by the statute), so that it was a scheme and contrivance merely to carry on the prosecution after the time was expired.

In the present case there is no ground to supersede the writs, and therefore all I could do would be to restore them as they were before.

It has been objected, they are so fixed by giving *oyer*, that I ought not to restore them; but suppose I should determine *the cursitor* has done wrong, and alter them, if the plaintiff was afterwards to move me to set them right, I am bound to do it, for it is merely a *vitium clerici*, and the party is not to be hurt by it.

What a circuity is this, that I should correct *the cursitor*, in order to bring on a motion of the party to amend the writs.

The next consideration is, what the defendants have done to wave this irregularity; and they certainly have gone a good way towards it.

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The oyer was on the 16th of *November*, so that the defendant's attorney saw at that time the variance between the original and declaration, therefore he should have pleaded *the variances* in abatement, instead of that he pleads outlawry in bar; (for a plea of outlawry may be pleaded either in disability of the person or in bar) and upon the 28th of *November* pleaded the general issue.

SMITH *v.* WILMER.

The defendant's attorney should have pleaded the variance between the original and the declaration *in abatement*, but instead of that he pleaded outlawry *in bar*, and after that the general issue, this is a waver of the irregularity.

To be sure this is a waver, and he should have applied to the court before by petition, complaining of this transaction, for he had all that time to do it in, between the 16th and 28th of *November*, and yet does not think proper to apply till the 17th of *December*.

Besides, what advantage can it be to the defendants to restore them, for the court of King's Bench cannot stay the proceedings in the suit, either for want of an original, or on account of a faulty original; for if the plaintiff has a verdict, that cures the want of it, and therefore they cannot stay the proceedings.

And by a new act of parliament made 5 *Geo.* 1 *ch.* 13. Lord *King's* act, even an error in substance is cured after verdict; for the words are "that where any verdict hath been, or shall "be given in any action, suit, bill, plaint or demand, in any of "his Majesty's courts of record at *Westminster*, or any other "court of record within *England* or *Wales*, the judgment there- [602] "upon shall not be staid or reversed for any defect or fault either "in form *or substance* in any bill, *writ original* judicial, or for any "variance in such writ, *from the declaration* or other proceed- "ings."

Upon the whole, it would be a most fruitless thing to supersede these writs, and put the parties to an expence of a further application; and therefore as to that I shall dismiss the petition; but as the plaintiff has put the defendants to the expence of *oyer*, he ought to pay the defendants the costs he has put them to of craving *oyer* of original writs in the court of King's Bench, and likewise the costs of this application; and his Lordship ordered accordingly.

At the Second Seal before Hilary Term 1747, Mr. Baron Clark sitting for Lord Chancellor. Case 233.

A Motion was made to discharge an order of the Master of the *Rolls*, to refer two bills brought by different creditors of one Mr. *Price* deceased, to a Master, to certify which suit would be most for the benefit of the creditors.

Three creditors who were within the terms of a trust created by a will for the payment of debts, bring a bill to carry the trusts of the will into execution; the rest of the creditors brought a second bill for the same purpose, and obtained an order at the *Rolls* that both bills might be referred to a Master to certify which would be most for the creditor's benefit. Mr. Baron *Clark* discharged the order, being of opinion, it has never been reduced to general rule, that one bill should be depending only where a number of creditors are concerned.

Mr. *Price* had by will appointed trustees over a particular fund, for the payment of such of his creditors by mortgage, bond, account, or otherwise, as were comprized in a schedule annexed to the will.

Three of these creditors, in behalf of themselves and others, bring a bill to carry the trusts of this will into execution.

The rest of the schedule creditors objecting to the framing of this bill, and suspecting collusion between the plaintiffs and the relations of Mr. *Price* the testator, who claimed annuities under his will, brought a second bill in behalf of themselves and all the schedule creditors, for the same purpose, and at a former seal obtained this order *ex parte* from the Master of the *Rolls*.

Mr. Baron *Clark*.

Suppose both these bills should come to a hearing, and the first should appear to be by collusion, as is suggested, it would then clearly be dismissed with costs.

It is allowed this is the first order that has ever been made of the kind.

[603] I see no difference between this case of trust creditors, and where all happen to be simple contract creditors, the latter may certainly bring different bills

How would the two causes be in a different state after the Master's report, than it is in now, for it is agreed by counsel on both sides, that if the Master should report the second, the most proper bill, yet the court would not preclude the plaintiffs in the first, from going on, if they thought fit, nor could the Master's report be made use of at the hearing, as evidence of the impropriety of the first

And if the court should be of opinion that justice may be obtained on the first, they will not take into their consideration, whether it is in every respect as properly framed as the second bill.

It has never been reduced to a general rule, nor ever can, that one bill should be depending only, where there is a number of creditors concerned.

If the first bill is so collusive, as that the Master must see it on the face of it, there can be no harm to the plaintiffs in the second, to let it proceed, because then the court will see it in the same light, and as I said before, dismiss it with costs, and consequently will not lessen the fund for payment of debts, which is the principal argument that has been used by the plaintiffs in the second bill.

Where there are two suits brought by different *prochein amies*, the court will refer them to see which is properest, because the court, as guardian of infants, will take care what is done shall be for their benefit.

As to the case mentioned of infants, where there are two suits brought by different *prochein amies*, and a reference to a Master to certify which is the properest, there the court is their guardian, and will take care what is done is for their benefit, and therefore is a very different case from the present.

I do

I do not find there has ever been such an order made as is now moved to be discharged, and would rather tend to create expence than to save it; and as the Master of the *Rolls* made the order merely *ex parte*, now it is controverted, I must be determined by my own judgment, and for the reasons I have given, am of opinion it ought to be discharged.

Fotherby versus *Pate*, *February* 9, 1747. **Case 234.**

An administrator *durante minore ætate*, is in general a competent witness after the administration is determined.

THE question was, Whether Mrs. *Pate* who was an administratrix *durante minore ætate* of an executor, can be a competent witness after her administration is determined.

The administration determined in 1744, and the bill was brought in 1745.

Lord Chancellor ordered the charges in the bill against Mrs. *Pate* to be read, which were to this effect, *that she had possessed the personal estate of the testator, which hath hitherto been got in, and hath not accounted or delivered it over.* [604]

In the joint answer of the executor and administratrix, they admit they received more than sufficient to pay the testator's debts and legacies; and though they do not in express words submit to account, yet in case the plaintiff's is a just demand, they submit to pay.

The general question depends upon two particular ones.

First, Whether she may in general be examined?

Secondly, Whether under particular circumstances she may?

As to the first, I do not remember this point to have come before the court, but am of opinion, taking it as a general question, she may.

The distinction, to be sure, is very well known, between an executor in trust, and a trustee (1).

A trustee is considered in this court as having no interest at all, and is examined by order every day; but an executor or administrator in trust have been determined not to be capable of being examined; the ground of this distinction is, that an executor is answerable for devastavits, &c. which may give an improper bias to his mind, and the possibility of male administration has induced this court to reject him as a witness.

A trustee, though he has the legal estate, is considered as having no interest at all in this court, and is examined by orders every day; but a person executor in trust, or administrator in trust, has been determined not to be capable of being examined; possibly the reasons of the difference are pretty nice, and it is very difficult to find out any real or solid foundation for it; but I take the ground to be, he is considered as representing the testator's estate, and is answerable for devastavits, &c. and that may give an improper bias to his mind; for as the law considers him as owner of the estate, the possibility of male-administration has induced this court to reject him as a witness.

(1) *Vide Mabank* v. *Metcalf*, *ante* 95. and the cases there cited.

Fothreby v. Paix.

An administrator *durante minore ætate* cannot sue, nor can he be called to an account but by the executor, and he is not answerable to any other person for whatever he may do during his administration.

But the case of an administrator *durante minore ætate* is certainly different; it is true, he represents the testator whilst his administration subsists, but when determined, has nothing more to do; such administrator cannot sue, that is certain, nor cannot be called to an account but by the executor, and whatever he may do during his administration, is not answerable to any other person, and if an action at law should be brought against the executor, he might be introduced as an evidence for the executor.

[605]

If an action at law should be brought against an executor, such an administrator may be introduced as a witness for him, and if so it would be hard to say he may not be examined in equity.

It is hard to say, taking it on the general question, that such a person should be allowed to be examined at law, and not in this court, for here it goes further in some instances than they do, by suffering trustees to be examined, and therefore will in this respect shut out light they let in at law.

He is very little more than a person appointed *ad colligendum bona*, or administrator *pendente lite*, who are always admitted as witnesses.

This administrator is little more than a person appointed *ad colligendum bona*, or an administrator *pendente lite*, and these are always admitted as witnesses.

After such administrator has possessed himself of effects, if brought before the court without the executor, he may demur for that cause.

After he has possessed himself of effects, if you bring him before the court, without the executor, he may demur for that cause, but as this court will allow you to follow assets into any hands, if you will by proper charges shew he has not accounted to his executor but fraudulently, and by collusion detains any part, there is no doubt but you may maintain such a bill against an administrator *durante minore ætate*.

As to the second question, Whether under particular circumstances he may be examined.

I think he may, but am of opinion that there are not such circumstances in this case as will entitle her to be examined, for it is charged by the bill, that she has not accounted, and delivered over the assets received by her to the executor.

That charge alone will not be sufficient; but then in the joint answer with the executor, instead of insisting she has accounted, and therefore that the bill should be dismissed as against her, she submits to pay, &c.

The bill charged the administratrix *durante minore ætate*, had not accounted and delivered over the assets received to the executor, who, by her answer instead of insisting she had accounted, submitted to pay, this made her an incompetent witness.

The answer might have been framed in such a manner as to make her a witness; she has put in such a one as will make her liable to account on her submission to pay, and therefore she is an incompetent witness, and rejected her accordingly.

Mitchell versus *Smart*, *February* 27, 1747. Case 235.

An executor as he is *in auter droit*, unless he has proved his testator's will, is not intitled to bring a bill of bring a bill of interpleader till, as standing in his place he has made himself a debtor.

ELIZABETH Brown, lessee for a long term, commencing in *Midsummer* 1737, agreed to pay for the first ten years 52*l.* *per ann.* for the next four 32*l.* *per ann.* and for the remainder of the term 24*l.* and covenanted with *Huet* the lessor, to pay the sum of 500*l.* at *Midsummer* 1747, and 200*l.* at *Midsummer* 1751.

Elizabeth Brown, in *April* 1743, assigned this term to *Fordam*, in consideration of 370*l.* and covenanted to pay the 700*l.* at the time in the lease mentioned, and by an indenture of the 8th of *April* 1743, between *Elizabeth Brown* of the first part, *Fordam* of the second, and *Richard Mitchell* of the third, taking notice that *Elizabeth Brown* had deposited 300*l.* in *Mitchell*'s hands, and thereby covenanted to indemnify *Fordam* against the 700*l.* Mr *Mitchell* covenants, that if Mrs *Brown* did not pay the 700*l.* at the times mentioned in the deed, then he would pay to *Fordam* the 300*l.* and covenanted further, that if Mrs. *Brown* paid the 500*l* part of the 700*l.* at *Midsummer* 1747, then he would pay to her the 300*l.*

Mrs. *Brown* died before *Midsummer* 1747, but before her death made her will, and appointed *Cartwright* and *Homan* her executors, neither she or they paid the 500*l.* at *Midsummer* 1747.

Fordam likewise died before *Midsummer* 1747, and made *Smart* and *Crosby* his executors, who have been evicted out of the possession of the leasehold estate, on account of the 500*l.* not being paid to the lessor at *Midsummer* 1747, then *Smart* and *Crosby* applied to *Richard Mitchell* to be paid the 300*l.* but he pretends Mrs. *Elizabeth Brown*'s executors claim it of him.

Richard Mitchell died at *Christmas* last, without paying the money, but before his death made his will, and appointed *Simon Mitchell* his father executor, but he has not yet proved it, and has now brought a bill of interpleader against *Smart* and *Crosby*, as executors of *Ralph Fordam*, and against *Cartwright* and *Homan*, as executors of Mrs. *Brown*, and prays that he may be permitted to bring the sum of 300*l.* into court, and that the defendants might interplead, suggesting that the executors of *Fordam* threaten to bring an action against him, and are now proceeding in the spiritual court, and therefore prays an injunction, and this day moved for the injunction, on bringing the money into court.

The defendants, the executors of *Fordam*, have put in an answer, and insist upon being paid the 300*l.* and that there ought to be no injunction.

The executors of Mrs. *Elizabeth Brown* have not yet answered.

Mitchell v. Smart.

Lord Chancellor,

Denied the motion, and said, that an executor as he is *in auter droit*, unless he has proved his testator's will, is not intitled to bring this bill of interpleader till, as standing in the place of the testator by virtue of the probate, he had made himself a debtor.

He may at law bring an action before probate, but he cannot declare till the will is actually proved.

An executor may at law bring an action before probate, but cannot declare till the will is actually proved, and a bill in equity being in the nature of a declaration at law, an executor cannot bring a bill here till after probate (1).

Though the plaintiff *Simon Mitchell* says, a caveat is entered against his proving the will of *Richard Mitchell*, it appears to be no more than a monition to the executor, in order that an inventory may be brought in, to found a commission of appraisement.

Another reason for denying the motion is, that the executors of Mrs. *Elizabeth Brown* have not yet put in their answer, which may possibly put an end to the question, and by the express covenant *Richard Mitchell* was to pay the 300 *l.* to *Foredam*.

(1) *Wills* v. *Rich*, *ante* 2 vol. 286. note 1.

Case 236. *Felton Harvey and Dorothy his Wife* versus *Solomon Ashley and others, March* 28, 1748, *when the Cause stood for Judgment.*

Lord Chancellor,

An infant is bound by a settlement made on her marriage, where it was made with the approbation of parents and guardians (1).

THIS cause comes before the court upon a bill brought by Mr. *Harvey* and his wife, to have the benefit of several provisions made for the plaintiff Mrs. *Harvey*, partly by the the will of her grandfather *Alexander Pitfield*, and partly upon the settlement made by her father and mother, notwithstanding the settlement was made upon her marriage, with her late husband *Charles Pitfield*, she being then an infant; the prayer of the bill is in the alternative, that if she cannot have this relief, then, that she may have satisfaction made her out of the estates of her late husband.

The case and the facts are these:

Dorothy Harvey, the plaintiff *Felton*'s wife, is the daughter of the defendant *Solomon Ashley*, and *Winefrid* his wife, and the grandaughter of *Alexander Pitfield*: In 1737, *Dorothy* being then of the age of fifteen, and her father and mother both living, she, with their consent, and with the approbation of all her relations, intermarried with *Charles Pitfield*, Esquire, her first cousin, and the heir male of her mother's family.

[608]

Previous to the marriage, a settlement was made on the 29th of *June* 1737; *Charles Pitfield* was the first party, two trustees, *&c.* were parties and the plaintiff *Dorothy* herself was a party; the estate of *Dorothy*'s fortune stood thus, she was intitled under her grandfather's will to 5000 *l.* which was to be paid her on marriage, if she married with the consent of her father and mo-

(1) See *Fonbl. Treatise of Equity*, 67. note *y.* and the cases referred to in the different parts of this case.

ther, or at her age of twenty-one; and if she married without such consent, or died before twenty-one, then the 5000*l.* was given over to her sister; besides this, she was likewise intitled to a portion under the marriage settlement of her father and mother; for by that settlement, in case of an eldest son, and younger children, a power was reserved to Mr. *Ashley* and his wife, to charge the estate therein limited with a sum not exceeding 4000*l.* which was to be paid to all or any of the younger children of the marriage in such proportions as they should think fit: and in case there was no issue male of that marriage, then a 500 year's term was limited to trustees, to raise the sum of 3000*l.* for daughters' portions, but this was not to be raised till after the death of the father, and if a son should be born afterwards, they were entitled to nothing.

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The other part of *Dorothy*'s fortune was a moiety of *Alexander Pitfield*'s personal estate after the death of her mother, but depending upon a contingency; for by his will, if Mr. *Ashley* and his wife died without leaving a son, then the residue of *Alexander Pitfield*'s personal estate (called 55,000*l.*) should go to such daughter or daughters of Mr. *Ashley* and his wife, as should be living at the death of Mrs. *Ashley*.

From hence it appears, that Mrs. *Harvey* was in present intitled only to 5000*l.* and in order to intitle her to it, the mother's consent by the grandfather's will was made necessary, if married before twenty-one, and if she had married without such consent of the mother, it would have gone to the other sister.

As to the circumstances of *Charles Pitfield*'s estate, they stood thus, he had an estate at *Hoxton* in *Middlesex* of 50*l.* a year, charged with a debt of 0000*l.* he had likewise a moiety of an estate in the *Isle of Ely* of the value of —— with incumbrances thereon to the amount of 6000*l.* and another estate in *London* and *Middlesex* of 900*l.* a year, which was in settlement to himself for life, remainder to his first and every other son in tail male, remainder to Mrs. *Ashley* in fee.

Under these circumstances the settlement made and executed was thus, as to the estate last mentioned, there was no occasion nor possibility to make any settlement of it, being limited in strict settlement to the issue male, and could not be altered; it frequently happening that estates are settled in such manner, that they must necessarily go to the issue of the marriage: as to the estate in *Hoxton*, it was settled upon the marriage in strict settlement; and in default of issue, to the survivor of the husband and wife: the estate in the isle of *Ely* is likewise limited in strict settlement, the last remainder to *Dorothy* in fee. [609]

In consideration of the marriage, and the husband's fortune, the lady's is settled in this manner, her 5000*l.* is agreed to be paid immediately, to discharge the incumbrances upon the *Hoxton* estate; one moiety of the sum of 3000*l.* to be raised by virtue of the term for that purpose, is to be applied in the same manner as the residue of the moiety of the contingent bequest in the grandfather's will aftermentioned; the other moiety of the 3000*l.*

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to belong to *Charles Pitfield*, but is not to be paid till after the death of *Dorothy*'s father: as to the contingent bequeſt, to which *Dorothy* was intitled under the will of *Alexander Pitfield*, a moiety of that was to go towards diſcharging the debt on Mr. *Charles Pitfield*'s eſtate; and what ſhould remain of that moiety was to be laid out in ſecurities, and the intereſt was to be paid to *Charles Pitfield* during his life, afterwards to *Dorothy* for life, then to the younger children, and if no younger children, then in truſt for the ſurvivor of *Charles Pitfield* and *Dorothy*, and the other moiety of the ſaid contingent bequeſts was to belong to *Charles Pitfield*, his executors and adminiſtrators; this is the diſpoſition made in favour of Mrs. *Harvey* of the ſurplus of the grandfather's perſonal eſtate.

The marriage took effect in *July* 1737; and ſubſequent to the marriage the facts are theſe; in *Auguſt* 1739, Mr. *Pitfield* died, and left iſſue one daughter *Mary*; in *December* 1740, the plaintiff *Dorothy* married with Mr. *Felton Harvey*; after the marriage the plaintiff Mr. *Harvey* entered upon the eſtate in ſettlement, that *Charles Pitfield* had ſettled, and did ſome acts of ownerſhip: in *June* 1743, the plaintiff *Dorothy* attained her age of twenty-one, and on the 10th of *January* 1745, the bill was brought.

It has been ſaid by the plaintiff's counſel that this is not a bill to ſet aſide the marriage ſettlement, for that would be too ſtrong, but only to let in the plaintiff *Dorothy*, and her ſecond huſband, to take that intereſt which ſhe had in her fortune; but this, in the preſent caſe, will appear to be a diſtinction in words only, for it is in effect to overturn the ſettlement after there is iſſue of that marriage, the huſband dead, and the contract on one ſide fixed.

[610] This ſeems to be a bill *primæ impreſſionis*, for upon looking into the caſes I can find no precedent to warrant ſuch a decree.

The two principal points ariſing upon this caſe are, *Firſt*, Whether Mr. and Mrs. *Harvey* are to be bound by this ſettlement on her firſt marriage, abſtracted from any circumſtances that have happened ſince.

Secondly, If they are not, whether what has been done by the plaintiffs ſubſequent to the ſettlement either by acts of admiſſion, acquieſcence, and by way of affirmance of it, will vary the caſe.

It is not material perhaps to give an opinion on the firſt queſtion, for the latter conſideration might poſſibly make the firſt point unneceſſary; but to diſcourage ſuch an attempt as is now ſet up, I will give my thoughts upon it.

As to the firſt point therefore the great objection is, that *Dorothy* at the time of the marriage and ſettlement made was an infant, and that by the rules of law ſhe could not be bound but by her election when of the age of twenty-one.

Where an agreement appears upon the face of it to be prejudicial to an infant it is void, but if for his advantage, then voidable only.

It is very true in law this difference is taken, that where an agreement appears upon the face of it to be prejudicial to an infant, it is void, but if for his advantage, then voidable only

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this doctrine is fully laid down in *Holt* versus *Ward*, in *Fitzgibbons's Reports*, 175, 275, a book of no authority; but the case is truly reported, and all the differences upon this point well taken, by Lord Chief Justice *Reeves* in his argument, which is the best I know upon the subject.

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Infants may contract marriage, males at *fourteen*, females at *twelve*, and these agreements differ from all others, the principal consideration is the marriage, settlements are prudential acts done chiefly for this consideration, and the estate settled may be greater or less according to the discretion of the parties; as soon as the marriage is had, the principal contract is executed, and cannot be set aside, or rescinded, the estate and capacities of the parties are altered, the children born of the marriage are equally purchasers under both father and mother, and there[illegible] it has been truly said that marriage contracts ought not to be rescinded, because it would affect the interest of third persons, *the issue*.

Marriage agreements differ from all others, as soon as the marriage is had the contract is executed, and cannot be rescinded, the children are equally purchasers under both father and mother, and therefore they cannot be set aside, because it would affect the interest of third persons, the *issue*.

[611]

There is a difference between agreements on marriage being carried into execution, and other agreements, for in common cases [illegible] considered as [illegible] the [illegible] of the [illegible] performance of the agreement [illegible] part, it cannot [illegible] specie, but must be left to an action at law, in marriage agreements it is otherwise, for though either the relations of the [illegible] or wife should fail in the performance of their part, yet the children may compel a performance [illegible] the mother's father [illegible] [illegible] [illegible] agreed to give a portion and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children [illegible] compel a settlement, for non-performance on one part shall [illegible] no [illegible] impediment to the children's receiving the full benefit of the settlement, for if there be a failure on the part of the father's relations it is the same, all the court could do in that case would be to lay hold on such [illegible] towards making good his portion of the settlement, for the children considered as purchasers are intitled to all the benefit [illegible] the uses under the settlement, notwithstanding there has been a failure on one side.

All other agreements [illegible] [illegible] [illegible] [illegible] [illegible] marriage agreements [illegible] [illegible] though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance. If the mother's father agree to give a portion, and the husband's father to make a settlement, though he does not give the portion, yet the children may compel a settlement.

If the court should relieve her, it must set aside the whole settlement, because every part [illegible] [illegible] [illegible] [illegible] there is a consideration arising from each part; and therefore it is impossible to take away any part of the consideration, without overturning the settlement [illegible] [illegible] [illegible] Mrs. *Harvey* herself would be [illegible] [illegible] [illegible], for she must in such case waive her jointure, and the husband perhaps might come into possession of the whole of her fortune, and [illegible] what use of it he pleases.

To go further; the law has intrusted the fathers and guardians with the marriage of their children and wards; and according to

Though a father or a guardian act fraudulently [illegible] corruptly, the marriage agreements [illegible] not to be set aside, or the children to be stript, but the father [illegible] guardian may be decreed to make satisfaction, and he himself [illegible] party to the fraud, shall [illegible]

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the old law they ought not to do it to their disparagement; but supposing they should act fraudulently or corruptly, the marriage agreement is not therefore to be set aside, or the children to be stript, but the father or guardian may be decreed to make satisfaction, and the husband, if a party to the fraud, shall do it likewise; analogous to those cases where fraudulent agreements have been made by parents to take back part of a child's fortune in contradiction to the open public agreement, in which cases the court interposes, as in *Turton* versus *Benson*, 2 *Vern*. 764.

The present case does not fall within the reason of these cases of corrupt agreements: here is no disparagement or pretence of [612] fraud, or of any gain made by the father or mother; but on the contrary every thing appears to be done by Mr. *Ashley* and his wife to advance it.

The daughter in the first place was married to the heir male of her mother's family, and by their consent to the marriage they accelerate her right to the 5000 *l*. and vests in *Dorothy* immediately though but *fifteen*; and, if there had been a son of Mr. *Ashley* and his wife, would have been intitled to nothing; and in 1727, it was not impossible in the course of nature but there might have been a son, and they could too have appointed the whole to one younger child in preference to another; and yet they took the only method of securing it, by making an appointment irrevocable of it under the settlement.

The parents did not make so beneficial a bargain for a daughter as they might have done, not a sufficient reason to set aside a marriage agreement; the law has intrusted them with the marriage of their children, and there are many considerations, and proper ones, that may induce a parent to agree to a match, besides a strict equality of fortune, as the inclination of the parties, &c.

Thus it stands as to the nature of the settlement; the first objection is as to the incapacity of *Dorothy* as an infant; and the second objection, that the parents of *Dorothy* did not make so beneficial a bargain for her as they might have done, admitting this was so, I apprehend it would not be a sufficient reason to set aside the marriage agreement; the law has intrusted parents with the marriage of their children; there are many considerations that may induce a parent to agree to a marriage besides a strict equality of fortune, as the inclination of the parties, their rank and quality, the person superior perhaps in this respect to whom the infant is to be married, and other advantageous circumstances; the conveniency too and propriety of such a match as to preserve the whole estate in the family, which are matters proper for parents to judge of.

Where an infant is married to a gentleman of great estate, though the dower is a third, and she has a jointure only of a tenth, yet as the law has intrusted parents with the judgment of provision for infants, the court shall not set it aside upon the inequality between the dower and the jointure.

The statute of *Hen*. 8. shews strongly the opinion of the legislature in this respect; for though at law no jointure upon a woman even of full age could bar her of dower: yet the statute makes it a bar, and a jointure will even bind an infant and preclude her from dower: consider the trust put in parents and guardians; suppose a female infant is married to a gentleman of great estate, the dower is one third, and yet she has a jointure made to her of only one tenth of the value; and notwithstanding this, as the law has intrusted parents and guardi-

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ans with the judgment of the provision for infants, she shall not set it aside upon the inequality between the dower and the jointure (1).

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I will not say how far a mere elusory jointure might be relieved against, but if it is not adequate to what she would have had in dower, it is no reason to set it aside.

[613]

There may have been acts of parliament obtained for the marriage of a young Lady an infant, who has an interest in a real estate, but I never heard of a private act of parliament obtained for the marriage of a young Lady who has a money portion only, merely because she is *an infant*.

No instance of applying for an act of parliament for the marriage of a young Lady, who has a money portion only, merely because she is an infant.

The reason why it may be necessary to apply for an act of parliament upon the marriage of an infant who has an interest in real estate, is, that the rights of the infant to real estate will not be bound by any agreement made in relation to it, unless the husband should have issue by that marriage.

The reason why such applications have been made in respect to real estate, is, that the rights of the infants shall not be bound by any agreement in relation to it, unless the husband should have issue by that marriage.

But where it is *a money portion*, her interest in it may be bound by agreement on the marriage; and if a parent or guardian cannot contract for the infant so as to bind this property, the husband, as it is a personal thing, would be intitled to the absolute property in it immediately upon the marriage.

Unless a father or a guardian could contract for the infant so as to bind money property, as it is a personal thing, the husband would be immediately intitled to it on the marriage.

To carry this still further than at the bar, it must be allowed most portions to young Ladies arise under settlements, and she is as much a purchaser as if it came from a collateral relation; and yet there never was any objection to a father's directing on what terms she shall be disposed of in marriage.

Most portions arise under settlements, and the daughter is as much a purchaser as if it came from a collateral relation, and yet there has never been any objection to the father's disposing of her in marriage on what terms he pleases.

Another objection was made, that as part of this fortune is a contingent interest, which by the marriage would not have been transferred to the husband, therefore what has been done with regard to this is redundant, and they should at least have left her the chance of taking the benefit of it.

(1) *Jordan* v. *Savage*, 2 *Eq. Ab.* 101. *pl.* 8. *Buckinghamshire* v. *Drury*, 5 *Bro. Par. Ca.* 570. *Har. Co. Litt.* 36, *b.* note 7. *Contra*, *Cray* v. *Willis*, 9 *Vin.* 249 *pl.* 18 In *Glover* v. *Bates*, *ante* 1 vol. 439. *Lord Hardwicke* held, that the settlement of the *personal* estate upon the wife *an infant*, in bar and satisfaction of her claim by the *custom*, or *any other usage or law*, could not bind her after her husband's death, tho' the agreement was entered into *before* marriage.

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I never heard any distinction where money portions were in possession or contingency; the case of *Theobald* versus *Defay* (1) determined finally in the House of Lords, is a very strong case to the purpose; the court there gave relief against a recovery in ejectment, and Lord *Cowper* and Lord *Macclesfield* laid great weight upon its being a reasonable act done by the consent of the friends and relation of the wife.

The plaintiff *Dorothy*, if she had been a feme sole, might have made a will of this contingent interest, and it being a personal thing, it is said she might have bequeathed it at *fifteen* years of age.

Many portions of women depend upon contingencies, as upon rights of survivorship; and yet dispositions of them are frequently made, for otherwise they might come absolutely in
[614] the power of their husbands, as where they fall into possession during the coverture.

Charles Pitfield indeed hath happened to die in the life of the mother and *Dorothy*; but suppose Mrs. *Ashley* had died, *Dorothy* and *Charles* surviving, would it not have been a great imputation on the father and mother if they had suffered the husband to run away with it?

It is dangerous therefore for the court to enter nicely into a scrutiny of this kind, when these provisions are made to guard against the husband, and a very prudent proper caution; nor will they, when the event has happened, determine whether at the time the agreement was made, it was more or less beneficial.

Besides, if the plaintiff Mrs. *Harvey* and her sister Mrs. *Beckford* had died in the life-time of their mother, *Charles Pitfield* would have been intitled to the surplus for his life under *Alexander Pitfield*'s will.

It is a very remarkable limitation in *Alexander*'s will, *to and for my grandson Charles Pitfield, after the decease of my two granddaughters.*

This is a very odd limitation of personal estate; but however, I do not know but it might take effect, as being in the compass of lives *in esse* at the same time, and consequently might have vested in *Charles Pitfield* himself; and the testator's intention was perhaps to augment and bring his fortune into one family.

I know of no precedents where a marriage agreement has been called into question in this manner, where it was made with the approbation of parents and guardians; but there have been several cases of decrees against infants.

In the case of *the Bishop of Bath and Wells* versus *Hippesley*, 28 *Cha.* 2. before Lord *Nottingham*; there was a submission to an award by the Bishop on one part, and the defendant, an infant and his guardian, on the other part; the award was to this effect, that during the Bishop's life, and the infant's minority, the plaintiff and defendant should be at liberty promiscuously to

(1) *Wms.* 608, 9. *Mod.* 101. S. C. *Vide Bates* v. *Dandy*, *ante* 2 vol. 208.

dig

dig lead ore in, &c. and that the profits should be divided equally between them: a bill was brought to confirm the award, and the court being of opinion the infant was bound by it, indemnified the trustees for what they had done, and decreed according to the prayer of the bill, that the award should be established. "In the case of *Strickland* versus *Coles*, the defendant was "seised for lives of a church lease in trust for an infant; on a "treaty of marriage between the infant and the plaintiff, and a "thousand pounds portion, an indenture was made with "the consent of *Coles* the guardian; whereby the infant cove- [615] "nants that the lease should be surrendered, and a new lease "taken, and the wife's life put therein for her jointure, *Coles* "was made party only to shew his consent. the marriage was "had, the portion paid, the husband died, the lease surren- "dered, and the wife's life put in: the widow sued *Coles* to "assign for her life, and decreed accordingly; and *Coles* pre- "tending the trust was in the first to pay debts to him, it was "decreed the debts should be paid out of the trust after the "widow's death." The decree affirmed on a rehearing. 2 *Ch. Cas.* 211.

In the case of *Blois* versus *Lady Hertford*, 2 *Vern.* 501. "*A.* "married *B.* who had an estate in land and a fortune in money; "they being both infants, an act of parliament was obtained for "settling a jointure on the wife in bar of dower, but to cease "if she did not settle her land when of age, but nothing said as "to the personal estate, part of the fortune in a mortgage for "1300 *l.* taken in a trustee's name; the wife when she "came of age settled her own land, and afterwards the hus- "band dies, the question was, whether this money should go "to the plaintiff, executors of Lord *Hertford*, or as a [illegible] "[illegible] survive to the wife. Lord *Cowper*, then Lord Keeper, "said, I lay no stress upon the declaration of trust, the law of "this court will presume a promise; and in all cases where a "settlement is equivalent, it shall be intended the husband was "to have the portion, the wife shall not have her jointure and "fortune both, and the father in this case became a trust, and "the husband could not come at it, so as to alter the property "without the assistance of this court, and the defendant was con- "demned in costs."

I mention this case only to shew, that though there was an act of parliament in consideration of real estate settled by both sides, yet no notice was taken of the money portion.

In the case of *Cannel* versus *Buckle*, 2 *Wms.* 243. Lord Chancellor *Macclesfield* said, "That if a feme infant seised in fee on "a marriage, with the consent of her guardians, should cove- "nant in consideration of a settlement to convey her inheri- "tance to her husband; if this were done in consideration "of a competent settlement, equity would execute the [illegible] "ment though no action would lie at law to recover damages "(1)."

(1) *Vide Durnford* v. *Lane* 1 *Bro. Cha. Rep.* 106. *Williams* v. *Williams, ibid.* 152. *Seccombe* v. *Glabl*, 2 *Bro. Chan. Rep.* 515. [illegible]

HARVEY v. ASHLEY.

This is going a great way, as it related to the inheritance of the wife; but yet there are cases where the court will do it; as if the lands of the wife were no more than adequate consideration for the settlement that the husband makes, and after the marriage the wife should die and leave issue, who would be intitled to portions provided for them by the settlement, it would in that case be very reasonable to affirm that settlement.

[616] Thus far upon *the first point*, relating to the force and validity of this settlement, as it stood originally, abstracted from the subsequent circumstances that have happened.

As to *the second point*, whether the plaintiffs are concluded by acts done since the marriage; and, admitting there was a doubt upon the first point, yet the second is very clear.

Tho' a freeman's widow lays claim to something under a husband's will, that does not bind her election to take either by the will or custom, till she has seen into the value of the husband's effects, but she will be concluded by acts done, and by acquiescence, as where she has lived a year or year and half after her husband, and accepted an interest under the will

It has been said on the part of the plaintiff, and very truly, that there has been no express assent in this cause, or express ratification of this settlement, and that the parties should not be bound unless the assent is clear, and after a full knowledge of the nature of the settlement, and therefore has been compared to the case of a freeman's widow, who, notwithstanding she lays claim to something under the will of her husband, will not bind her election to take either by will or custom, till she has seen into the value of her husband's effects; and this is true in general; but there are cases where she shall be concluded by acts done by her, and by an acquiescence; as, where she has lived a year, or a year and half, after her husband, and accepted an interest under the will, and then dies, and upon her death the executor files a bill for her customary share; there the bill has been dismissed (1).

There is sufficient evidence here of the plaintiff *Felton Harvey*'s having knowledge and notice of *Dorothy*'s rights under this settlement: In 1742 he made a lease of a house in *Piccadilly*; in *December* 1744 he gave a letter of attorney to receive the rents of part of the estate, and in *January* 1744 a distress was made by virtue of an authority given by him; and in *May* 1745 he gave directions for getting in the hay, and all this was done after a counsel of eminence for the plaintiffs had perused the settlement.

There can hardly be a case where there have been more solemn acts done to affirm a settlement: In *Franklin* versus *Thornbury* 1 *Vern.* 132. an agreement being void as against an infant, yet was decreed, the infant having received interest under it after he became of full age, which was an affirmance of it.

In the case of *Cecil and others* versus *The Earl of Salisbury*, in 2 *Vern.* 224. the court said, "They would hold an infant to "his offer made by him in his answer to a bill brought against

(1) *Tomkyns* v. *Ladbroke*, 2 *Ves.* 593.

"him while an infant, if the other side are thereby delayed, "and if he would have departed from what he had offered, he "ought immediately when he came of age to have applied to "the court to have retracted his offer, and amended his an-"swer:" So, where a provision is made for a wife in lieu of her jointure, by articles during coverture, if the wife, after the husband's death, enters but upon *part* of these lands, she is obliged to perform the whole articles.

HARVEY v. ASHLEY.

These cases turn upon this, that acts done after the becoming a widow will bind; but it has been objected these were acts of her husband, and cannot bind the wife, who was an infant in the life-time of her first husband, and likewise an infant for some time since her marriage to her second husband. [617]

This appears to me to be a new doctrine, that though Mr. *Felton Harvey* himself would be bound, yet he is delivered from it on account of the infancy of the wife, which is in effect to say, he cannot be bound at all.

If a feme infant marry, and a jointure is made after marriage, and the husband dies, leaving her an infant, if she, without doing any act to determine her election during her infancy, marries a second husband, if he enters upon the jointure estate, that entry will bind the husband and wife during the coverture.

Where a jointure is made after marriage, and the husband dies, leaving his wife an infant, if she, without doing any act to determine her election, marries a second husband, if he enters on the jointure estate, that entry will bind them both during the coverture.

These are my thoughts on the two main points of the cause; but another objection was made, that *Charles Pitfield* was guilty of a fraud in secreting judgments, and other debts, that were charged upon the estate, and that this is a ground for relief; and so it is, but not to set aside the whole settlement, for if there are any incumbrances which he did not disclose, then *Charles Pitfield's unsettled estate* ought to be applied to exonerate that estate which is settled for the benefit of Mrs. *Harvey and her issue*.

As to so much of the bill, therefore, as seeks to set aside, or to break in and impeach the settlement made on the marriage of Mrs. *Pitfield*, it ought to be dismissed; and Lord *Hardwicke* decreed accordingly.

Case 237. *Tilbury* versus *Barbut*, *March* 2, 1747.

S. C. 1 Vef. 89. *T.* devifes all his real and perfonal eftate to his wife for life, and after her death to his fon *John*, and his heirs for ever, and in cafe of the death of *John without any heir*, then to the plaintiff: *John* levied no fine, nor fuffered any recovery, but by will devifed the whole to the defendant. *This is a fee mounted on a fee, and a void devife to the plaintiff in law, and equally fo in equity* (1).

A Bill was brought againft the defendant to deliver up all the deeds, &c. of the eftate mentioned in the pleadings of the caufe.

The queftion depends upon the will of the late Doctor *Tilbury*, who thereby devifed all his real and perfonal eftate to his wife *Ann Tilbury* for life, and after her death to his fon *John*, a younger brother of the plaintiff's by another venter, and his heirs for ever, and in cafe of the death of *John Tilbury*, *without any heir*, then his real and perfonal eftate devifed to his fon *John*, fhall go and be enjoyed by his fon *Cornelius* the plaintiff.

[618] *Ann Tilbury* died in 1725; *John Tilbury* the fon levied no fine, nor fuffered any recovery, but made his will, and devifed it to the defendant.

The queftion is, whether *John Tilbury* took an eftate in fee, or in tail, under the teftator's will, or whether the plaintiff takes any more than an eftate for life.

Lord Chancellor,

In all devifes of this kind, *where there is a fee mounted upon a fee*, I dare fay the teftators mean heirs of the body, but unlefs there are words to reftrain it to an eftate tail, I am bound to conftrue it a fee in the firft taker, and confequently, as the teftator had devifed the whole to *John Tilbury*, the fecond devife is void in law.

I cannot go on a prefumption the teftator did not know the law; if teftators do not ufe proper words the court will fupply it; where the intention of the teftator is confiftent with the rules of law, but where *there is a fee mounted on a fee*, it is a void devife to the plaintiff in law; and as this is a legal eftate, I muft conftrue it the fame in equity.

(1) So 3 *Leon.* 111. *Attorney General* v. *Gill*, 2 *P. W.* 369. But where the limitation over is to a perfon, who is a *collateral heir* to the firft devifee, then the devife creates an *eftate tail*. *Webb.* v. *Herring*, *Cro. Jac.* 415. *Nottingham* v. *Jennings*, 1 *P. W.* 23. *Tyte* v *Willis*, *Ca. Temp. Talb.* 1. *Allen* v. *Spendlove*, 2 *Eq. Ab.* 305. *pl.* 2. *Goodright* v. *Dunham*, *Dougl.* 254. *Morgan* v. *Griffiths*, *Cowp.* 234. *Pickering* v. *Towers*, *Amb.* 363. *Ives* v. *Legge*, 3 *Term Rep.* 488. note. *Doe* v. *Perring*, 3 *Term Rep.* 491. *Fearne* 350.

Anonymous. March 10, 1747. *The third Seal after Hilary Term.* Case 238.

A *Guardian* for an infant brought an action against him for board, &c. before he had passed his accounts in this court, the defendant at law brought a bill here for an injunction to stay the proceedings at law, and Mr. *Brown* shewed cause to day why it should not be dissolved; his Lordship continued the injunction, and said, that in taking the account the court would allow the guardian according to the maintenance allotted for the infant, which a jury would have no regard to, but in case the guardian had any aged witnesses, the court upon application and proper affidavit, would give leave to examine *de bene esse*.

A guardian, before he had passed his accounts, brought an action against an infant for board, the court continued the injunction prayed by the infant's bill till the hearing, and said in taking the account, the court would allow the guardian, *according to the maintenance allotted for the infant*, to which the jury would have no regard.

W[illegible] and [illegible]ers versus *Thistlethwait, Puckeridge and others, March* 10, 1747. *Third Seal after Hilary Term.* Case 239.

[619]

THE plaintiff, in *December* 1747, obtained an order, that the defendant *Puckeridge* should bring in his book of accounts, papers and writings, before a Master, pursuant to a decree; in four days after notice to his clerk in court, or that a serjeant at arms should go to bring him before the court for his contempt.

In all cases of commitment there must be an affidavit of service.

On the 16th of *January*, 1747, *Puckeridge*'s clerk in court was served with notice.

On the 18th of *June* he obtained an order for three weeks time to bring in his books of account, &c.

On the 9th of *February* last he obtained an order for a month's more time.

The last order for time being expired, it was moved this day, that a serjeant at arms might go against the defendant.

The person who served *Puckeridge*'s clerk in court being in the country, and the plaintiff not being able to procure an affidavit of service, offered, as a proof of the defendant's being served, a recital in his last order for time, of notice of the plaintiff's order of the 16th of *January*; and it was insisted by Mr. *Tracy Atkyns* for the plaintiff, that *Puckeridge*'s orders were of themselves a proof he had notice, for he could apply only on the foundation of the plaintiff's order.

But notwithstanding this, as it was a motion for taking the defendant into custody the court would not grant it, and said, in all cases of commitment there must be an affidavit of service.

Case 240. *Mendes* versus *Mendes*, in the Paper of Re-hearings, March 11, 1747.

1 Vez. 89. S. C. A father must be presumed to make such provisions as will answer the purpose of children, and their advancement in the world, and the will ought to be so construed as to carry the intention of the parent into execution.

[*620]

ALVARO Mendes, the plaintiff's late father, being possessed of a very considerable personal estate, by will dated the 8th of *May* 1728, "gave to the defendant *Rachel Mendes* his "daughter, 6000 *l.* and to the defendant *Catharine* his other "daughter 5000 *l.* to be paid them respectively on their at- "*taining the age of 26 years, or days of marriage, but in "case both or either of them should die before their respective "legacies became due, then the legacy or legacies of her or them "so dying, *together with the interest or increase thereof*, should "go to and be equally divided between his two sons the plaintiffs, "and in case of the death of either of them, then to the survivor of them; and the testator directed that 600 *l.* a year "should be given to his wife, the defendant *Sarah*, out of his "estate, for the maintenance and education of the plaintiffs and "their sisters, the defendants *Rachel* and *Catharine*, whilst they "should continue to live with her, and at her charge; and "devised all the residue of his estate, both real and personal, "to the plaintiffs, to be equally divided between them; and "in case of either of the plaintiffs' deaths, the whole residue "of the estate to be enjoyed by the survivor; and in case of "both the plaintiffs' deaths, *without leaving lawful issue*, then "the residuary part of the estate he directed should be divided "in the following manner; namely, one part to his wife the "defendant *Sarah*; and the other to his daughters the de- "fendants *Rachel* and *Catherine* equally and their issue, and "*for want of issue*, to the survivor of them; and if all his "children *should die unmarried, and without issue*, then he gave "the residuary part of his estate, one half to his wife, one "fourth to his brother *Anthony Mendes*, and in case of his "death, to his children; and one fourth in like manner to "his brother *James Mendes* and his children, and made the "defendants *Anthony*, *James* and *Lewis Mendes* executors, who "proved the will, and possessed themselves of the testator's "estate."

After the appointment of the executors under Mr. *Alvaro Mendes*'s will, are these words; "*Memorandum*, The six hun- "dred pounds *per ann.* I have ordered should be allowed my "said wife for my childrens maintenance, is to be regulated "as follows, *viz.* one hundred pounds *per ann.* to be allowed "by each girl, and two hundred pounds *per ann.* is to be al- "lowed by each boy, and in case of the death of any of my said "children, *the inheritor or inheritors* are to pay their share or "proportion, so that the said sum of six hundred pounds may "not prove deficient; to be placed at the end of the will."

The two sons of the testator, soon after his death, brought a bill by *Anthony de Costa*, their next friend, for an account of the testator's

testator's personal estate, and that it may be secured for the plaintiffs benefit. MENDES v. MENDES.

The executors submitted to account, and to apply the estate as the court shall direct.

The children of *Anthony* and *James Mendes*, insisted on the benefit of the contingent limitations in the testator's will, in regard to part of the *residuum* of the testator's estate. [621]

The 16th of *June*, 1733, the executors were decreed to account for the personal estate of the testator; all directions touching the several limitations over of the legacies of 6000 *l.* and 5000 *l.* and the residue of the personal estate, and surplus interest were reserved until the contingencies upon which the same are to take place shall happen; the plaintiffs were to be at liberty at 21, and the daughters at 26, or on proposals made for their marriage to apply to the court.

The plaintiff *Moses Mendes* having attained his age of 21 years, on the 13th of *December*, 1746, petitioned the court that one moiety of the *residuum* of the testator's personal estate might be assigned to him; and it was ordered that the cause be set down in the paper of re-hearings on the matter reserved by the decree, which was done accordingly, and was this day heard before Lord Chancellor.

Mr. Attorney General for the plaintiffs, the two sons of the testator, insisted, that the residue ought to be divided between the two plaintiffs; for *equally to be divided*, in the first part, is clearly a tenancy in common, and the words *to be enjoyed by the survivor* were not intended to make a jointenancy, which would be a contradiction, and therefore the court will put such a construction as will make the whole consistent, and construe the testator's meaning to be in case of the death of either of his sons, in his life-time.

The next words are, *in case of both my sons' deaths, without leaving lawful issue, &c.* this must be meant on the same contingency as the former, in case of the death of either in the life-time of the testator, for to construe it a dying without issue generally, is too remote, and consequently the limitation over is void, and a court of equity rather leans against multiplicity of divisions and contingencies of personal estate, unless the court are under a necessity of doing it.

And if all his children *should die unmarried, or without issue*, then he gives the residuary part, one half to his wife *&c.*

One of them is married, and therefore that contingency can never happen; but then there is a disjunctive *or without issue*, this he insisted, for the reason before given, was a void limitation, being after issue generally, and for this purpose cited the case of *Lord George Beauclerk* versus *Miss Dormer*, *June* 17, 1742, (See 2 *Tr. Atk. p.* 308.) and *Saltren* versus *Saltren*, *July* 24, 1742, (See 2 *Tr. Atk.* 376.) and *Green* versus *Rod*, *June* 1, 1729 (1). [622

(1) *Fitz. Gibb.* 68. S. C.

 Mr.

Mendes v. Mendes.

Mr. *Brown* of the same side.

The intention of the testator seems, that if both sons should live to take, that then it should go no farther, or otherwise they can never have any benefit if they should want to settle in the world, and did not mean it should go over, but upon the contingency of both the sons dying in his lifetime.

The contingency to the testator's two brothers is, if all the children should die unmarried, or without issue.

One of the contingencies can never happen, for one of the daughters is married.

And as to the other contingency, it is too remote, for it is on a dying without issue generally, and there is no word that confines it to a dying without issue at the death of the devisee.

Mr. *Noel* of the same side.

The two sons were extremely young when the will was made, for they were but three years old when their father died; the residue is directed to be divided equally between them, but the testator has fixed no time; the reasonable time, therefore must be when his sons came to the age of 21 years, which will make the whole will consistent, or otherwise there never can be a period of time in which the sons could divide.

Mr. *Solicitor General* for the brothers and nephews of the testator.

It is very true that the testator cannot be understood to give the residue to the surviving son, upon the other dying at any time, but it must be restrained to some particular time, though not to the times insisted on by the plaintiff's counsel, as to either son dying before the testator, or before the sons age of 21 years, for if one of the sons had died after the testator, the surviving son would have taken the whole, nor could it intend a dying before 21, for if one son had married before 21, and left issue, and died before that age: the whole, if this construction took place, must go to the surviving son, which could not be the meaning of the testator.

The true restriction is, if the contingency should happen to both, that is, if both the sons should die without leaving lawful issue at their death, then to go over.

[623] The rules are very well settled with regard to executory limitations of personal estate, for I take it, since the case of *Lord George Beauclerk* versus *Miss Dormer*, it is established that a devise over after a dying without issue generally is void, and as clear where there are any words that confine it to a dying without leaving issue at the time of his death, a devise to take effect after such a dying is not too remote; for this purpose he cited *Forth* versus *Chapman*, 1 *Wms.* 663. and *Pinbury* versus *Elken*, *Prec. in Chan.* 483. and *Target* versus *Gaunt*, 1 *Wms.* 432.

Where the words are to the daughters equally, and their issue, *and for want of issue*, to the survivor of them, it must

mean

mean issue in her who dies first in the life-time of the survivor; the subsequent words, if all his children should die unmarried, *or without issue*, must be construed so as to make the will consistent, and the last clause must be restrained by the former. He cited *[illegible] versus [illegible]*, *May* 3, 1731, as a case in point. MENDES v. MENDES.

Mr. *W[illegible]* of the same side observed, that *S[illegible]* is in all the contingencies to have a moiety, which shews the testator meant they should all take effect in the compass of one life, *[illegible]*, for the moiety is not to go to her [illegible] to her executor, but to her only, and therefore the devise [illegible] is not too remote; he cited the case of *Spalding* versus *Spalding*, *Cro. Car.* 185.

LORD CHANCELLOR,

This, though very incautiously made, is the will of a father who is providing for a wife and children, and a father must be presumed to make such provisions as would answer the purpose of portions and advancement in the world; in order to that, such construction should be made as would enable the children to carry on trade, or provide for a wife if married, and likewise for their issue; in this view I consider the present will.

The first difficulty of construction arises from the devise of the residue of the testator's personal estate to his two sons who were very young at the testator's death; the words are, to be equally divided between them, *and in case of the death of either*, the whole to be enjoyed by the survivor.

The first question is, What is the meaning of the words *in case of the death of either*, &c.

It is admitted on all hands, these words must receive a reasonable construction, he knew they might live to be 80 years old, and have children, and therefore could not mean if they died at any time the portion should go over.

It is contended on the part of the plaintiffs, that the words mean the death of the sons without issue, in the life-time of the testator, but they cannot be construed in that [illegible], as the will in other places denotes a case that may arise after the testator's death, for plainly, through the whole will, where he gives an accruer over to other children, or right of survivorship, he means after his own death. [624]

In case of the death of both or either of his daughters before, *&c.* then the legacy or legacies of her or them, *&c. together with the interest or increase thereof*, should go to his sons, *&c.* so that he not only directs the principal, but the increase of interest to go over, and the latter clearly could not be till after his death.

The other construction contended for by the plaintiffs is, that the testator meant to confine it to the death of his sons without issue before the age of 21.

It has been admitted by the defendant's counsel to be a reasonable construction, if there were words to warrant it.

Mendes v. Mendes.

Upon reading the whole will, I am of opinion it is the true construction (1), and if the words will warrant it, a reasonable construction also, and such as a father may be supposed to have in view, when he was settling his estate for the benefit of his family.

Consider the other parts of his will, where he gives portions to his daughters, for though he makes use of general words, yet it is plain he meant a particular period of time; for in the devise over to his sons, he says, in case either of the daughters die before 26 or marriage, then to go to and be equally divided between my two sons, which points out that it was his intent that the sons, in case of that event, should have the sisters portions absolutely.

It is plain from the whole context this was his meaning; consider the clause of maintenance, which also shews the testator's intent; he gives 600*l.* *per ann.* for the maintenance, &c. of the plaintiffs and their sisters, whilst they should continue to live with the mother, and at her charge.

I should apprehend this might amount to a devise of the guardianship, but do not give an absolute opinion.

Whilst they should continue to live with her, how long is that? Till 21, for she was the mother and guardian by nature, therefore her care must continue till a proper age; and tho' a guardianship in socage determines at 14, and such infant might elect, yet in this case here are no socage lands, and consequently the guardianship continues till 21 (2).

[625] The memorandum is not by way of codicil or distinct instrument, but only added to the foot of the will, because it was too long to be interlined, and therefore amounts to no more than an interlineation: the intention of it was to keep up intire the six hundred pounds, the sum allotted for maintenance of his children.

The words *inheritor or inheritors*, made use of there, mean those of the children who should take by survivorship, the share of the children so dying, should contribute to make up the maintenance, and this memorandum should be read with the clause of the will, which provides for the maintenance.

A hundred pounds *per ann.* to be allowed by each girl, and two hundred pounds by each boy, and in case of the death of any of my said children, the inheritor, &c.

When is that death to be? most clearly before their age of twenty-one, and therefore this ought to be read as an addition or interlineation to that clause which directs the maintenance.

If the will is to be so read, and means clearly a death before twenty one, then the clause immediately following the maintenance is the devise of the residue, both real and personal, to his two sons, to be equally divided, and in case of the deaths, &c. the whole residue, &c. so that here is the same form of

(1) *Vide* [illegible] v. *Hawes, ante* 524. (2) *Vide Har. Co. Litt.* 88, *b.* notes 11. 12 13. 14 15. 16.

expression

expression as is made use of in the clause regulating the maintenance; and where death generally is mentioned in other parts of the will, what construction can be more reasonable than to construe in the sense testator himself had used it before. MENDES v. MENDES.

And as in the case of the present Earl of *Shaftsbury*, the court held, that notwithstanding his marriage the guardianship did not determine till his age of twenty-one (1); so here the sharing and division ought to be amongst the children of Mr. *Mendes* at their age of twenty-one, when capable of receiving it. A guardianship of an infant, notwithstanding he marries, does not determine till his age of 21.

I am of opinion the words, if both my sons should die without leaving lawful issue, mean a dying before twenty-one with regard to them, and the subsequent words, if all his children should die unmarried, or without issue, mean as to the daughters dying before twenty-six or marriage; but even if they had died before twenty-one, and had lawful issue, I should have been of opinion it would not have gone over.

This is the most reasonable construction; and as the sons have attained twenty-one, no contingency hath happened with regard to them, and therefore the residue of the testator's real and personal estate vests absolutely in the two sons as tenants in common, or otherwise in case of their marriage they can make no provision for a wife, or any issue of the marriage. [626]

This makes a consistent plan of the whole will, and it is very happy that the memorandum was at the bottom of it, for from thence it is clear he intended, if both his sons died before twenty one, the residue should go over, but not otherwise.

In consequence of this opinion, his Lordship ordered the residue of the testator's estate to be paid to the plaintiffs (2).

(1) *Vide 1 Roach Garman*, 1 *Vez.* 160 (2) *Reg. Lib* B. 1747. fol. 200.

Gregory versus *Molesworth*, *March* 21, 1747. Case 241.

A Plea of a former decree signed and inrolled was pleaded to a new bill for the same matter.

Mr. Attorney General in support of the plea insisted, that an infant is bound by a decree in the cause when she is plaintiff, as much as a person of full age; and was so determined between *The Dutchess of Buckingham* versus *Sheffield*, before Lord *Hardwicke* (2). An infant is bound by a decree in a cause where he is plaintiff, as much as a person of full age (1).

LORD CHANCELLOR,

This is a plain case, for it would be very mischievous if a new bill was allowed to be brought by the plaintiff here.

This is a plea of a former decree made in a cause relevant to the same matter with the present bill.

The question will be *first*, whether the decree is a determination of the points between the parties.

(1) *Lord Brooke* v. *Lord Hertford*, 2 *P. W.* 519. (2) *Ante* 1 vol. 628.

Gregory v. Molesworth.

As to this it is improper for the court to give a different judgment, because there would be two contradictory judgments appearing on the same records.

The former decree was on a bill brought by the plaintiff's wife, to have an account of her father's personal estate, and to have a fifth as her share of it; that bill charges the defendant pretends the legacy of *Margaret Molesworth* was lapsed; this is the common and only way of bringing on the question, by setting forth the pretences of the defendant, and therefore sufficiently puts the point in issue.

The decree has directed an account to be taken of the estate, and expresly that the *South-sea* stock should be sold, and one fifth part reserved for the benefit of Sir *John Molesworth*, when he attained his age of twenty-one.

[627] This is as full a determination against the plaintiff, as if a declaration on the point that the plaintiff is not intitled.

Though an action be brought for several demands, and judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

Courts of equity, no more than courts of law, are not obliged to give reasons for their judgment; if a man in a court of law brings his action for several demands, and he has a judgment for one only, it is as much a judgment as if there had been a particular determination upon each.

A decree can be altered only by bill of review, either for error on the face of the decree, or for new matter not known at the time of bringing the first bill.

Here she was of age during some of the proceedings in the cause, but if she had continued an infant during all the time of the proceedings, she is as much bound though an infant, as a person of full age; I know but of one case that is an exception, *Lady Effingham* versus *Sir John Napper* (1), where, upon an appeal from Lord *Macclesfield*'s decree with regard to real estate, the House of Lords gave Sir *John Napper* leave to shew cause, when he came of age, against his own decree.

An infant, after being of age, is not allowed by a new bill to dispute any thing that was done during his minority with regard to maintenance, &c.

But it would be most mischievous with regard to personal estate, if an infant after being of age, was allowed by a new bill to dispute any thing that was done during his minority, with regard to maintenance, education, &c.

The rule at law is, that an infant is as much bound by a judgment in his own action, as if of full age.

It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action, as if of full age; and this is general, unless gross laches, or fraud and collusion appear in *the prochein amy*, then the infant might open it by a new bill.

I cannot presume that improper proofs were made in the former cause, but must take it for granted that proper ones were given, unless the inrollment of the decree was opened by bill of

(1) 2 *P. W.* 401.

review

review, and the plea to that bill disallowed, there the court over-rule the plea, and then the cause is opened again, and I can properly come at it, if error appear on the face of it (1), but as it stands now the plea must be allowed. *Gregory v. Molesworth.*

(1) G[illegible] 2 [illegible] 534.

Rotheram versus *Fenshaw*, *March* 25, 1748, *the first Seal after Hilary Term*. Case 242. [628]

THE defendant instituted a suit in the ecclesiastical court for subtraction of tithes, the defendant, without pleading any discharge there, brings his bill in this court to establish a *modus*; the answer to this bill does not admit it, and the motion now is for an injunction to stay the proceedings in the ecclesiastical court, upon the bare suggestion of a *modus* by his bill.

A suit in the ecclesiastical court for subtraction of tithes, the defendant [illegible] to establish a *modus* [illegible] for an injunction to stay the proceedings in the ecclesiastical court [illegible]. The injunction denied, as it would [illegible] tripping up the heels of two courts, the ecclesiastical, and the court of common law.

LORD CHANCELLOR,

An injunction is prayed on two heads, *First*, On a presumption from a constant and immemorial payment [illegible] there must have been [illegible] from the [illegible] under whom the defendant claims, though the plaintiff is not able to produce the particular grant [illegible] or deed.

Secondly, Upon a suggestion in the bill, that there has been a *modus* or composition [illegible] of tithes.

If I should [illegible] it would be [illegible] precedent for tripping up the heels of two courts, the ecclesiastical court, and a court of common law.

The ecclesiastical court [illegible] to return [illegible] for tithes, whether at the instance of a spiritual person, or any impropriator.

There may be a suit too in that court for *modus's*, as well as for tithes in kind.

The defendant likewise may plead a *modus* there, if admitted: the ecclesiastical court may [illegible] upon the *modus*, if denied, the ecclesiastical court cannot proceed [illegible], and if so, it is the common suggestion for a prohibition in the court of King's Bench, but if you come there for a prohibition, you must first shew the *modus* has been pleaded in the ecclesiastical court, and denied there.

The court of King's Bench will not grant a prohibition unless you shew the *modus* has been pleaded in the ecclesiastical court and denied there; and on the same grounds a court of Law grants a prohibition, this court grants an injunction.

No such thing has been shewn in this case; but a bill is brought to establish a *modus*, and prays an injunction to stay proceedings in the ecclesiastical court, upon the suggestion of a *modus* only.

ROTHERAM v. FANSHAW.

I cannot grant an injunction here but upon the same grounds as a court of law would grant a prohibition, *propter triationis defectum*.

Injunctions in this court are granted upon a suggestion of something which affects the right or convenience of the party in the proceedings in the other court, or where there is a concurrent jurisdiction.

Where a suit is instituted in the spiritual court, for an infant's legacy by a father, to have it paid into his hands, the court will grant an injunction, because it will not allow the infant's money to come into the father's hands.

As in a suit for a legacy in the spirtual court, where the party cannot have the advantage of the discovery he wants, which he may have here, then this court will interfere; as where a suit is instituted in the spiritual court for an infant's legacy by a father his guardian, to have it paid into the father's hands, this court will not suffer such payment to be made, but will grant an injunction, because it will not allow the money of an infant to come into the father's hands, but does not grant an injunction, because the spiritual court have not a jurisdiction in legacies, but from the general care it takes of the interest of infants (1).

The modus is not admitted by the answer to the bill in this court, and if insufficient, you may except to the answer; and even if the suit goes on in the spiritual court, and a sentence is pronounced for the tithes, it is no prejudice at all to the plaintiff in his suit depending here.

But if I was to grant this motion, I should take away the jurisdiction of the spiritual court on the one hand, and the court of common law on the other.

As to the non-payment of the tithe hay, it is insisted, the owner of the land was formerly a purchaser of the tithes, and has enjoyed the land and tithes together for a great length of time, which is a presumptive evidence of his right.

But this is not a ground for an injunction in a case of this nature.

A lay impropriator cannot prescribe in *non decimando* any more than a spiritual person.

A lay impropriator is to be sure different from a spiritual in some respects; since the reformation, and the acts for dissolution of monasteries, tithes by grants from the crown are become lay fees; so that in fact lay impropriators have as much power to convey a portion of tithes as any part of the land itself: and therefore it was said, it is hard the plaintiff should not in this case have the same advantage of presumptive evidence from long possession in the case of tithes, as well as in any other case relating to an estate of inheritance; and it was a saying of Lord Justice *Hale*, he would presume even an act of parliament made in favour *of length of possession*: but the court of Exchequer in the case of *The Aldermen of Bury* versus *Evans*, *Comyns's Rep.* 643. would not lay down a different rule as to prescribing in *non decimando*, in regard to lay impropriators and spiritual persons, but

[630] held such a prescription equally bad against both.

(1) *Vide Anon, ante* 1 vol. 491.

Upon

Upon the whole, I do not see there is any reason at all for the injunction which is now moved; why did not the plaintiff go upon the length of possession in the ecclesiastical court? He might have pleaded it there, as well as insist upon it here in his bill; and if the ecclesiastical court would not determine upon the same evidence as a court of common law would have done, it is the usual ground for a prohibition, and no other court has the cognizance of it but the court of King's Bench, and therefore I will not make such a precedent, as by a side-wind will take away the jurisdiction of both courts at once. Lord *Hardwicke* therefore denied the motion.

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The plaintiff might have pleaded length of possession in the ecclesiastical court, and if they refused to determine upon the same evidence as a court of law would have done it is the usual ground for a prohibition, and the court of King's Bench has alone the cognizance of it.

Heams versus *Bance, among the Cause Petitions, March* 25, 1748. Case 243.

LORD Chancellor since *Hilary* term last ordered this cause to stand over, to search the register's book for the case of *Ridout* versus *Lord Plymouth* (1), which had been mentioned at that time as an authority in point, but being looked into, it did not appear to be at all similar to the present, in which the question is, Whether a mortgagee who lent a further sum afterwards upon bond, should be allowed to tack it to his mortgage, in preference to other creditors under a trust for payment of debts created by the will of the mortgagor?

A mortgagee who lent a further sum upon bond, shall not be allowed to tack it to his mortgage in preference to creditors under a trust created by the will of the mortgagor for payment of debts (2).

LORD CHANCELLOR,

I have considered this case, and am inclined to think the mortgagee shall not be allowed to tack the bond to the mortgage, with regard to the heir of the mortgagor; the reason why he shall not redeem the mortgage without paying the bond likewise, is to prevent a circuity, because the moment the estate descends upon him it becomes assets in his hands, and liable to the bond (3); and a devisee too of the mortgaged premisses for his own benefit is subject to the same rule since the statute of fraudulent devises made in favour of bond creditors (4).

The reason why the heir of the mortgagor shall not redeem the mortgage without paying the bond likewise, is to prevent a circuity, because the moment the estate descended it became assets, and liable to the bond, the same rule will hold as to a devisee of the mortgaged premisses.

But this is a devise in trust for the payment of debts, and the descent is consequently broke, so that, as I am at present advised, I am of opinion the mortgagee can have no priority with regard to his bond, but as to that, must come in *pro rata* with the rest of the creditors under the trust; but if the counsel for the mortgagee have an inclination to be heard on this point, it shall stand

(1) *Ante* 2 vol. 104 S. C.
(2) So *Price* v. *Fastnidge, Amb.* 685.
(3) *Powis* v. *Corbet, ante* 556.
(4) *Challis* v. *Casborn, Prec. Cha.* 407

Hearne v. Banks.

The Attorney General of counsel for him said, he thought the point was too strong against the mortgagee to be maintained, and the court thereupon made the decree accordingly.

Case 244. *Buck* versus *Draper*, March 26, 1736.

The ecclesiastical courts in the country ought not to take upon them to appoint guardians [illegible], without a suit instituted for that purpose, and by this means [illegible] upon the jurisdiction of this court [illegible]

Lord Hardwicke recommended [illegible] to the Attorney General [illegible] not to [illegible] to the ecclesiastical courts upon such an extrajudicial [illegible]

A Petition was preferred by the defendant, to discharge an order of the Master of the Rolls, appointing the plaintiff guardian of her daughter, upon an allegation of his unfitness, as being disordered in his mind, *and that the petitioner had been long before appointed guardian by the [illegible] court at York* (1), and had by virtue of that appointment taken possession of the infant's person and estate.

Lord Chancellor dismissed the petition [illegible], the facts of the lunacy not being at all made out, and said, he was surprised upon what pretence the ecclesiastical courts in the country take upon them to appoint guardians [illegible], without any suit instituted for that purpose, and by this [illegible] upon the jurisdiction of this court with regard to the guardianship of infants, and said, he recommended it to the Attorney General to consider whether [illegible] to the ecclesiastical courts upon such an extrajudicial appointment of guardians to infants, where no suit at all [illegible] for that purpose.

(1) This circumstance is not mentioned in Rep. [illegible] A. 1737 fol. 274.

Case 245. *Brown* versus *Durston and others*, [illegible] 27, 1737.

The executor of a bond creditor of Sir W. F. brings a bill for an account of his personal estate, [illegible] short of satisfying the debts, [illegible] part of the real estate may be sold. The real estate [illegible] never [illegible] after [illegible] Sir W. F. [illegible] settlement made after his marriage, are not liable to his debts by specialty, [illegible] they are [illegible] upon the estate.

THE late Sir *William Fowler*, on the 18th of *May*, 17[illegible], gave a bond to *Richard P[illegible]*, in the penalty of 200*l.* for the payment of 100*l.*

Sir *William Fowler* made a will, and appointed executors, but they renouncing, administration with the will annexed was granted to the defendant *Durston*: the testator at his death left a son and three daughters, all infants.

[632] The testator's personal estate is inconsiderable, and covered by judgments and other securities, and therefore the plaintiff, the executor of *Richard Powell*, has brought his bill for an account

count of Sir *William*'s personal estate, and in case it falls short of satisfying his debts, prays that a sufficient part of his real estate may be sold.

The defendants, the children of Sir *William Fowler*, by their answer insist, that he did in the life-time of his father Sir *Richard Fowler*, by lease releate o the 7th and 8th of *March*, 1728, in consideration of a marriage before had between him and Dame *Harriot Newton* his wife, and of a portion of 2000 *l.* limit the several estates mentioned in the deed to the use of him and *Harriot* his wife, and their issue, and covenanted that he would within six months after the death of Sir *Richard Fowler* levy a fine, and suffer a recovery for the better assuring the premisses to the uses in the release, and had a power to revoke all the uses in the release, and to create new.

After the death of Sir *Richard Fowler*, Sir *William Fowler* did, by deed dated the 7th of *March*, 1733, indorsed on the release of the 8th of *March*, 1728, by virtue of the power, revoke all the uses limited by the release, and appointed the estates contained in the release, to two persons and their heirs, in order to settle the same in the manner mentioned in the indorsed deed.

Recoveries were soon after suffered of these estates, and by lease and release dated the 4th and 5th of *July*, 1734, in consideration of the marriage, and other considerations, and for providing a jointure for the defendant's mother, and for settling the said estates on the issue male of the marriage, and for making provisions for daughters, and younger children, in performance of the trust created by the deed of the 7th of *March*, 1733, Sir *William Fowler* did convey to two persons, and their heirs, the said estates to he use of the defendant's father for life, remainder to trustee s o support contingent remainders, remainder subject to the p made for defendant's mother, to *Newton* and *Sloane* for 2000 years, upon trust for raising portions for the daughters and younger children of the marriage, remainder to the first and other sons in tail male of Sir *William Fowler*, remainder in fee to the father.

The defendant, the present Sir *William Fowler*, insisted, that Dame *Sarah Fowler* the widow of his grandfather Sir *Richard*, is still living, and therefore such part of the estate as was her jointure, whereof she was in possession, was not affected by the recovery suffered by his father, but the defendant is intitled thereto as tenant in tail male in remainder, expectant on the death of Dame *Sarah Fowler*, by virtue of the settlement made thereof previous to the marriage of Sir *Richard Fowler* with Dame *Sarah*; and the other defendants, the younger children of Sir *William*, likewise insist, that the testator did not die seised of any real estate subject to his debts, but long before his death had settled the same in such manner that they became intitled to it on his death, as purchasers for a valuable consideration discharged of any debts or other incumbrances. [633]

The

Brown v. Durston.

The counſel for the plaintiff inſiſted, that in caſe any ſuch ſettlement was made, it was executed after marriage, and merely voluntary, nor was any ſum ever paid as a portion with Dame *Harriot*, Sir *William*'s wife, and therefore ſuch ſettlement ought not to prevail againſt the teſtator's creditors, but as to them ought to be deemed fraudulent, and ſet aſide.

Mr. Solicitor General for the defendants argued, that this ſettlement is not fraudulent, though made after marriage, and though no portion was paid, for there was no debts then due from Sir *William Fowler*, that he covenanted by the firſt ſettlement to make a good ſettlement, and afterwards, when his father died, he ſuffered a recovery, and declared the uſes according to that covenant.

Lord Chancellor,

The queſtion is, Whether this laſt ſettlement is fraudulent and void againſt the bond creditors of Sir *William Fowler*? And as to this, the real eſtate was never aſſets of Sir *William Fowler*, and therefore the lands compriſed in this ſettlement were not liable to his debts by ſpecialty, for the debts by ſpecialty are not ſpecific liens upon the eſtate, and the debtor Sir *William Fowler* has done no more by this recovery, with regard to his creditors, than what was done by his father's marriage ſettlement, for by that ſettlement the ſon of Sir *William* would be now tenant in tail, and his entail'd eſtate would not be liable to his father's debts, and the recovery, though it would let in all ſuch debts as were ſpecific liens, yet will not do ſo as to the debts by ſpecialty (1).

Lord Hardwicke therefore diſmiſſed the bill againſt the defendants the infants.

(1) [illegible] *Rolls* [illegible], art. 1 vol. 16.

Caſe 246. *April* 19, 1747. *Firſt Seal after Eaſter Term.*

A plaintiff may ſerve any two of the defendant's commiſſioners with notice of the execution of the commiſſion, and is not tied down to thoſe only as the defendant ſhould chuſe.

A Commiſſion iſſued out of chancery for the examination of witneſſes directed to *Sweden*, after each party had ſtruck off four, there remained four of a ſide; the plaintiff now moved that he might be at liberty to ſerve any one or two of the defendant's commiſſioners with notice of the execution of it.

[634] Mr. *Bignell* for the defendant inſiſted, that according to the rule of the court the plaintiff ought to ſerve ſuch two of the defendant's commiſſioners as he ſhould chuſe, or otherwiſe it might be in the power of the plaintiff to chuſe thoſe out of the four that he liked beſt, which might be a prejudice to the defendant.

Lord Chancellor ordered that the plaintiff ſhould be at liberty to ſerve any two of the defendant's commiſſioners, and that the

rule could never be as Mr. *Bignell* laid it down, because it would be attended with this inconvenience, that if the two particular commiſſioners choſen by the defendant ſhould happen to be abſent from the place appointed for the execution of the commiſſion, or either of them ſhould be dead, it could not be executed, and for that very reaſon the court lets four commiſſioners ſtand on each ſide to guard againſt ſuch accidents.

Hay verſus *Hay*, *March* 28, 1748. Caſe 247.

THE defendant by petition applies to the court for directions upon the Maſter to review his report.

The defendant obtained an order for the Maſter to tax the coſts of a trial in ejectment in the country, in which there was a verdict for the plaintiff.

The plaintiff had defended a petition for a new trial, but it was granted notwithſtanding.

The Maſter, in taxing the coſts of a former trial, allowed 17 *l.* odd money to the plaintiff for his coſts, in oppoſing the petition for a new trial; he likewiſe allowed 5 *l.* for the plaintiff's briefs, and 5 *l.* 5 *s.* for copies to counſel.

Lord *Hardwicke* declared he knew of no rule for allowing the coſts of ſuch a motion or petition, where the other ſide prevailed, but ſaid in this caſe, as the plaintiff was obliged to defend the firſt petition for the new trial, as it was neceſſary the court ſhould grant it on terms only, he was of opinion the Maſter had done right to allow that; but if the application for a new trial had been upon clear grounds and plain facts, then he ſhould have been of opinion the plaintiff ought not to have had his coſts.

As to the briefs, he ſaid, they might ſerve again upon the ſecond trial, and therefore diſallowed the 5 *l.* 5 *s.* for copies to counſel.

In the matter of Heli a Lunatick, *March* 31, 1748. Caſe 248.

[635]

Where the lunacy of a perſon is in queſtion, the court will make a proviſional order as to his effects, till the point of the lunacy is determined.

AN application was made by the heirs at law for reſtitution of goods, taken by *Kent* and *Pain*, inn-keepers, belonging to a lunatick, and that care may be taken of his eſtate.

LORD CHANCELLOR,

The power of the Chancellor over ideots and lunaticks is by ſign manual of the King, counterſigned by the two ſecretaries of ſtate, impowering him to take care of them in the right of the crown, and to make grants of their eſtates.

One part of the Chancellor's power in relation to ideots and lunaticks is by virtue of a ſign manual of the King, upon his coming to the great ſeal, and counterſigned by the two ſecretaries of ſtate, empowering him to take care of ſuch perſons in

the right of the Crown, and to make grants from time to time of the ideot's or lunatick's estates (1).

The question is, whether a person can traverse an inquisition of lunacy without bringing the lunatick *in propriâ personâ* before the court, and whether the court will interpose by making any provisional order for the care and custody of the estate, till the lunacy is finally determined.

In *Fitzherbert's Nat. Brev.* under title *De idiota inquirendo & examinando* 532. it is laid down, "That though a man be found "an ideot by inquisition taken before the sheriff, and by their "examination, *&c.* and that be returned into the Chancery, yet "he who is so found ideot may in person, or by his friends, "come into Chancery before the Chancellor, *&c.* and shew "the matter, and pray that he may be examined before the "Chancellor, whether he be ideot or not; and if upon exa- "mination he be found no ideot, then the inquisition found "before the sheriff, and also the examination which the sheriff "hath made and returned thereupon, shall be of no effect, but "the same office shall be taken as void without any other "traverse."

The same holds as to an inquisition of lunacy, though the consequences are different.

Lord *Hardwicke* made a provisional order of the lunatick's effects, and that [illegible] should produce Mr. *Hely* next day for the inspection of the court.

(1) The Bailiffs and Burgesses of the Corporation of *B[illegible]for[illegible], ante* 2 vol 553

Case 249.

[630]

Lloyd versus B[illegible], April 25, 1748.

The advantage a purchaser receives from the wearing out of lives has never been considered as a reason by this court for his paying interest for the purchase money.

IT was prayed by petition that the plaintiff, who was purchaser of an estate sold by a decree of this court for payment of the debts of the plaintiff's father, may pay interest for the purchase money from the time of his being confirmed the best purchaser the 18th of *October* 1744.

At the time the purchaser was let into possession of the estate, a small part consisted in rack-rents, but the greatest part was standing out in reversions upon lives; two of those reversionary estates are fallen in since the purchase.

It was insisted for the petitioners, that unless there is something to take it out of the common rule, this is an application of course, and the case *Ex parte Manning*, 2 *P. Wms.* 410 was cited by Mr. *Tracy Atkyns*, where Sir *Joseph Jekyll* said, "that "after a report of a person's being the best purchaser has been "absolutely confirmed, from that time he is sure of his title and "his purchase, though the tenant for life had died the next "day,

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"day, and from that time the life was wearing, which is "equivalent to the taking of the profits; and in case the purchaser had taken the profits, he must certainly have paid "interest, and directed the purchaser to pay interest from "the time of his being absolutely confirmed the best purchaser."

The case of *Davy* versus *Barber*, *January* 15, 1742, (See 2 *Tr. Atk.* 489.) was likewise cited to shew, that the contingency of lives falling in has been considered as the rents of the estate, and such an advantage to the purchaser, that the court will on that account charge a purchaser with interest on his purchase-money till paid.

Mr. Attorney General for the purchaser said, it was reasonable he should make some compensation to the persons intitled to the purchase-money for this advantage which has happened by dropping in of lives since the purchase, but that he ought not to be charged with interest for the purchase-money till the conveyances from all proper parties have been executed to him, which are not yet done.

Mr. *Wilbraham* of the same side insisted, that a purchaser is not obliged to pay his money till he has a good title, and if it is not imputable to the plaintiff that he has been guilty of laches in not procuring a title, he ought not to be charged with interest: It is the vendor's business to see a good title is made, and not the purchaser's; and as this is a dry reversion, and the purchaser has received very little advantage from it, it would be hard to make him pay interest from the time he has been let into possession.

Mr. Solicitor General in reply said, nothing was wanting to make the purchaser a good title, but a bare assignment of a mortgage term, on paying off the mortgagee, who was very willing to take his money. [637]

One of the estates was let out on three lives in 1676, upon a reserved rent of one pound only, it is most probable they may all fall in at a year's distance at farthest, for it is 72 years since the estate was let out on lives, and consequently the youngest of the lives must be turned of seventy.

LORD CHANCELLOR,

I am of opinion the plaintiff should not pay interest, and several distinctions have been taken in cases of this kind.

To be sure, neither in the purchase of estates in possession, or in reversion, whether purchased under a private agreement, or purchased under a decree for a sale, can it be laid down in certain that from the time of possession, a purchaser shall pay interest.

It is not a general rule, that a purchaser of estates under a private agreement, or a decree for a sale shall from the time of possession pay interest.

As to estates in possession upon a private purchase, the court never regards execution of articles for purchase, but the time of the execution of conveyances, and even there, if the vendor has made default in letting the vendee into possession, he

The court in awarding of interest never regards the execution of articles for a purchase, but the time of the execution of the conveyances, and even then the purchaser shall pay interest only from the time the possession is delivered.

Blount v. Blount.

he shall not pay interest for the purchase money; but if he has taken possession, the court will give such interest as is agreeable to the nature of the land purchased.

In biddings before Masters, they are made general, and the court discourages any particular terms to be put upon those biddings.

If the purchaser has not had possession upon execution of conveyances, he shall not pay interest at all: from the time of the delivery of possession he shall.

So much for estates in possession; next, as to dry reversions; in *Owen*'s case, that has been mentioned, he was intitled to all the profits during the intermediate time, and he was intitled to a dry reversion after an estate for life; *Owen* was tenant by the courtesy, and the court was of opinion he had created difficulties in respect of the conveyance which was to be made to him, that he need not to have done, and therefore were of opinion he ought to pay interest from the time he ought to have executed the conveyance.

[638] The present is a middle case; the father creates a thousand years term for particular purposes; the trustees did not think proper to take possession; the plaintiff therefore, as heir at law, took possession, and afterwards becomes purchaser of the estate, and accounts for profits before the Master to *Michaelmas* 1745, a year after being confirmed the best purchaser (1).

It is said he is a purchaser of a reversionary estate, but is is not so, he is the purchaser of a thousand years term, and is himself owner of the reversion.

The estate consisted chiefly of life-holds, and therefore it is insisted, as they are perpetually falling in, he ought not to run away with the benefit of this, and yet not pay interest for the purchase money.

And, to be sure, in general this may be right, but I do not know yet whether he may be the purchaser, for possibly the father may not make a good title, and besides, he is not in possession under the purchase, but as heir at law of his father, on the trustees of the 1000 years term refusing to take possession.

But if these leases are renewed, I think it is reasonable Mr. *Blount* should account for the fines, as being part of the profits of the estate conveyed by the thousand year's term.

Therefore this is a middle case distinguishable from the case of a dry reversion, and from *Owen*'s case.

Where, after a person is reported the best purchaser, lives dropt in, the court have directed the purchaser to make some compensation in respect to the estates being bettered.

Where estates for lives have dropt in between a person's being reported the best purchaser by the master, and his taking possession, the court have either directed a purchaser to make

(1) The petition stated, that the plaintiff entered upon the premises upon his being confirmed the best purchaser; and that he had not accounted for the rents and profits since *Michaelmas* 1744.

some

some compensation in consideration of the estates being bettered; or otherwise to go before a Master again, and the estate to be put up for a new bidding. BLOUNT v. BLOUNT.

But here no possession was delivered to the purchaser by virtue of his purchase, nor is it his default at all that the conveyances have not been made, and is subject to an account, and therefore no pretence for making him pay interest.

As to what has been said of the advantage a purchaser receives from wearing out of lives, I never knew the court take this into their consideration as a reason for a purchaser's paying interest.

But I will direct the Master to inquire what increase of value has arisen by the falling in of lives since the purchase of the estate, and what has been received for heriots by the purchaser, or for fines in letting out estates again (1); and declare they ought to be considered as part of the profits of the trust-estate of a thousand years, and let Mr. *Michael Blount* account for the same as such in a subsequent account to be taken by the Master, and let him proceed in his purchase (2). [639]

(1) Not in *Lib.* (2) *Reg. Lib.* A. 1747. fol 423.

Ex parte Croxall, Minister of the united Parishes of St. Mary Somerset and St. Mary Mounthaw in the City of London, April 25, 1748. Case 250.

A petition to Lord Chancellor to issue his warrant for levying the sum therein mentioned on the inhabitants who had refused the minister his dues, according to an assessment in 1681. under the act for the better settling the maintenance of the parsons, &c in the parishes of the city of *London* burnt by the fire. *If the Lord Mayor has done wrong in refusing his warrant of distress, this court can issue their warrant for levying the sums assessed.*

THE petition prayed, that Lord Chancellor would issue his warrant for levying the sums of money mentioned in the petition, on several of the inhabitants of these parishes who had refused to pay the minister his dues according to an assessment in 1681.

It depended upon the construction on the statute of 22 & 23 *Ch.* 2. *chap.* 15. intitled, An act for the better settlement of the maintenance of the parsons, vicars and curates, in the parishes of the city of *London*, burnt by the fire.

The question was, whether the great seal has an authority under this act to issue such warrant as is prayed, if the Lord Mayor, upon an application to him, refuses to issue one.

The counsel for the petitioner, in support of the authority of the great seal, cited the case "*ex parte Savage, rector of the* "*united parishes of St. Andrew Wardrobe and St. Anne Black-*"*friars*, and *ex parte Wood, rector of St. Michael Royal and* "*St. Martin Vintry*, which came before Lord *Harcourt* on petition the 29th of *October* 1713, setting forth, that the pe-

Ex parte CROX-ALL.

"tioners had respectively demanded of the inhabitants the respective rates and arrears for the houses, &c. in their respective occupations, but they refused to pay the same, and "that the petitioners applied to Sir *Richard Hoare*, Lord Mayor, "for such warrants as the act of parliament directed him to "grant for levying the said money, and he refused to grant such "warrants; wherefore it was prayed that his Lordship would "grant the petitioners his warrant to levy the several sums of "money so respectively due to them, by distress and sale of such "goods of the parishes so refusing to pay, according to the di-"rections of the act of parliament."

Lord *Harcourt* thinking the matter of the petition was of great consequence to the inhabitants of the several parishes mentioned in the act, as well as to the clergy of the city of *London*, as no such complaint since the making of the act had been before made to the Lord Chancellor, or Lord Keeper of the great seal, or to any two of the Barons of the Exchequer, desired the assistance of Mr. Baron *Bury* and Mr. Baron *Price*; and on the [640] second of *December* following it came on again in their presence, when it appeared that several of the quarterly sums claimed by the petitioners became due, and in arrear, when the houses, or other hereditaments, whereon such quarterly sums were assessed, stood empty, or were in the possession of former tenants or occupiers thereof; and a question thereupon arising, whether such sums so assessed upon the several houses within the several parishes mentioned in the act, for making up certain annual sums of money to be paid in lieu of tithes, were become a fixed or real charge upon the houses whereon they had been so assessed, so that the arrears which became due in the time of former tenants, or when the houses were empty, might be levied on the succeeding tenants; the further consideration of the petitions were adjourned to the 23d of *December*, upon which day the two Barons certified their opinion, "That by the statute, the sums of money which have been "duly according to the directions of the act assessed upon the "several houses, &c. within the parishes in the act are be-"come real charges upon the houses, &c. whereon they were so "assessed, so that the arrears which ought to have been paid "by the former occupiers of the houses, or which became due "when the houses stood empty, may be levied by distress and "sale of the goods of the present occupiers; and Lord *Har-*"*court* declared he intirely concurred in opinion with the "Barons, and that the petitioners were at liberty to apply to him "for warrants of distresses, as prayed by their petition; but di-"rected them first to demand from the several persons men-"tioned in the petitions the respective sums due from them, that "they might have an opportunity of paying them without further "trouble or charge."

LORD CHANCELLOR,

The act of parliament directs, "that the alderman of each "respective ward within the city of *London*, wherein any of

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" the said parishes respectively lie, and his deputy or deputies, " and the common council-men of each respective ward, with " the churchwardens, and one or more of the parishioners of " each respective parish wherein the maintenance is respective- " ly to be assessed, to be nominated by such respective alder- " man, deputy, common council-men and churchwardens, or " any five of them, whereof the alderman or his deputy to be " one, shall at some convenient and seasonable time assemble " and meet together in some place within each of the res- " pective parishes in such respective ward wherein the main- " tenance aforesaid is to be assessed, and they, or the major " part of them so assembled, shall proportionably assess upon " all houses, shops, warehouses and cellars, wharfs, keys, " cranes, waterhouses and tofts of ground, and all other " hereditaments whatsoever, the whole respective sum by [641] " this act appointed in the most equal way, that the said as- " sessors, according to the best of their judgments, can make " it."

Another provision in the act is, that if any difference should arise in the assessment, and a parishioner shall find himself aggrieved by the assessing of any sum of money in the manner aforesaid, " That then upon complaint made by the party " aggrieved to the Lord Mayor and court of Aldermen, they " summoning as well the party aggrieved, as the Alderman and " such others as made the assessment, shall hear and determine " the same in a summary way, and the judgment by them given " shall be final and without appeal."

After settling the manner of making assessments, and no appeals, then comes a clause that directs, upon refusal of the inhabitants of the respective parishes to pay to the respective incumbents any sum respectively payable, how the same shall be levied.

" That it shall and may be lawful for the Lord Mayor of " the city of *London* for the time being, upon oath to be " made before him of such refusal, to grant a warrant for the " officer appointed to collect the same, with the assistance of a " constable in the day-time to levy the same tithes, or sums of " money so due and in arrear, by distress and sale of the goods of " the party so refusing."

Then comes the proviso, which gives jurisdiction to the great seal.

" Provided that in case the Lord Mayor or court of Alder- " men shall refuse to execute any of the respective powers to " them by this act granted, or to perform all and every such " thing relating either to the assessing or levying of the respective " sums aforesaid;"

" That then it shall and may be lawful for the Lord Chan- " cellor, or Lord Keeper of the great seal for the time being, " or any two or more of the Barons of his Majesty's court of " Exchequer, by warrant under his or their respective hands " and seals to do and perform what the said Lord Mayor and " court of Aldermen, according to the true intent and meaning

v. Crox- all. "of this act might, or ought to have done, and by such warrant "either to impower any person to make the respective assessments, or to authorize the respective officers appointed to collect the sums aforesaid, to levy the same by distress and sale of "the goods of any person that shall refuse to pay the same in "manner and form aforesaid."

I must take it here as if the assessment was made.

The authority of the great seal does not extend to every case under this act, but only where there has been a refusal by the
[642] Lord Mayor, &c. to execute the powers granted to them, there the Lord Chancellor, or, &c. for the time being, are to issue a warrant, &c.

Here the Lord Mayor has heard the parties, and is of opinion not to grant a warrant.

In one case the act did not intend to leave the minister so far in the power of common council-men and churchwardens as to abide by their determination, but he has his appeal; and it does not only give an appeal to the minister, but to the inhabitant, for the words are, *if any variance or difference in the assessment, and a parishioner shall find himself aggrieved, &c. and Lord Mayor's determination is final there.*

In the other case where there is no controversy about the assessment, but a refusal to pay; and though the words are, *shall and may be lawful*, yet that is imperative upon the Lord Mayor, if a just demand.

In case of any variance or difference in the assessment between the minister and the parishioners, and appeal to the Lord Mayor, the court of Chancery or Exchequer have no jurisdiction, unless the Lord Mayor refuses to take cognizance, because that would be refusing to execute their own power, but if they have entered into the consideration of the grievance in any manner, then appeal would be final.

In the present case the only act the Lord Mayor was to do, was to issue a warrant, he has refused it, and unless I enter into the question, whether Lord Mayor ought to have issued a warrant, I can never judge whether he had a power to do it or no.

Here it appears to me, a plain direction in the act of parliament, for this warrant must have been founded upon an assessment, and as to the parishioner, if the Lord Mayor had issued a warrant improperly, an action of trespass would have lain against him, and that might be his reason for refusing it.

Upon the whole, I think the court has a jurisdiction to inquire whether the Lord Mayor has done right in refusing the warrant, and if of opinion he has done wrong, I can issue my warrant for levying the sums assessed, and his Lordship gave directions accordingly.

There being a dispute whether part of the premisses were liable to the assessment, by consent of all parties, the court referred it to arbitrators.

Callaghan versus *Rochfort*, *April* 27, 1748. Case 251.

A Motion was made for a commission to *Cork* in *Ireland* to examine witnesses to the credit and competency of a person who had given evidence in the cause, and against whose competency the party now moving had exhibited articles after publication passed.

Lord Chancellor denied the motion, and said, it was never allowed to exhibit articles against the competency of a witness after publication, because this might have been objected to and inquired into upon the examination; and for this very purpose the witness is to be shewn to the clerk in court of the opposite party, though at the same time he said, it might be reasonable to allow an examination to competency *after publication*, where the objection to the competency arose from a matter that came to the knowledge of the party after the examination; and the proper way to apply for this, would be not by exhibiting articles, but by motion for leave to examine to this matter upon a foundation of ignorance at the time of the examination.

The court will not allow articles to be exhibited against the competency of a witness *after publication*, because this might have been objected to and inquired into upon the examination.

As to the commission to examine in support of the articles which went to the credit of the witness, *Lord Hardwicke* said, the court will allow such articles to credit *after publication*, because the matters examined to in such cases were not material to the merits of the cause, but only relative to the characters of the witnesses, and yet no commission was ever granted into foreign parts to support such articles, (and *Ireland*, tho' belonging to the dominions of the crown of *Great Britain*, with respect to the jurisdiction of this court, is considered as a foreign part), because this would introduce a certain method of delay; and if it was ever to be granted upon great necessity, and in a case of consequence, the only ground of it must be, that no person in *England* could swear any thing as to the witnesses' credit: but the affidavit which has been read in this case to induce me to grant the commission is silent as to this, so that there may be persons here who can speak both for and against the credit of *the witness*.

The court will allow such articles *to the credit of a witness after publication*, because the matters examined into in such cases were not material to the merits of the cause; but not where the commission is to go to foreign parts, because this would introduce a certain method of delay unless no person in *England* can swear to the person's credit.

And as these applications are most frequently made for delay merely, his Lordship said he should be extremely cautious how he grants them; and as there was no absolute necessity in this case, he denied the motion.

Case 252. *July* 30, 1748.

To a bill brought against an arbitrator, seeking a discovery of the grounds on which he made his award, he pleaded in bar that he was not obliged to set them forth; the court thought it unreasonable he should be put to so much trouble and expence, and allowed the plea.

THE bill was brought to set aside an award, and the arbitrator was made a party, and seeks a discovery from him of the grounds and foundation upon which he made the award, and to set it forth minutely in his answer.

The arbitrator pleaded in bar to so much as seeks so particular a discovery, that he was not obliged to set forth minutely the grounds and foundation upon which he made his award.

Lord Chancellor,

If there be a palpable mistake or miscalculation, the party aggrieved may bring his bill against the party in whose favour the award is made, to have it rectified, and not against the arbitrator.

Unless there is corruption or partiality in an arbitrator, the party cannot set aside his award (1); and if it should be allowed to make arbitrators defendants, and give them all this trouble to set forth the particular reasons upon which they founded their award, it would introduce very great inconvenience, and be a discouragement to any person to undertake a reference; if there was any palpable mistake made by an arbitrator, or miscalculation in an account (2), that had been laid before him, the party aggrieved might bring his bill against the party, in whose favour the award is made, to have it rectified, and not against the arbitrator.

His Lordship said, he did not know whether there was any established rule of the court with regard to arbitrators setting forth the reasons of their award, and how far they were obliged to discover, and how far not; but if there was none, he should not scruple to make one, because it would be unreasonable to put an arbitrator to so much trouble and expence, as such an answer must necessarily give them. Lord *Hardwicke* allowed the plea.

(1) *Metcalfe* v. *Ives*, ante 1 vol. 64. *Tittenson* v. *Peat*, ante 529.

(2) *Ridout* v. *Payne* ante 494. 1 *Vez.* 11. S. C.

Case 253. *Fonereau* versus *Fonereau*, *August* 5, 1748.

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S. C. 1 Vez. 118.

A devise to C. F. of 1000*l.* when he attains 25, and the executors impowered to lay it out on securities, and pay the interest thereof towards the infant's education, as also a part of the principal to put him apprentice, and the remainder to be paid him at 21, and not before; the legatee died at 19, and the father applies to have the securities transferred to him. *The time of 25 years is merely to postpone the payment, and vesting of the legacy, and the father as the representative of the son intitled to it.*

A Devise to *Claudius Fonereau*, when he shall have attained the age of twenty-five years, of one thousand pounds, which the testator impowered his four sons his executors, guardians, and trustees of the will, to lay out on such securities as

they

they shall think fit, and the interest or income thereof to be for or towards the education of the infant as they should think fit, as also part of the principal to put him apprentice, and the remainder to be paid him when he should have attained his age of twenty five, and not before.

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A petition by the father, the representative of the legatee, who died at nineteen, to have the securities transferred to him.

LORD CHANCELLOR,

The question is, whether the time of twenty-five years is put in, in order to postpone the vesting of the legacy, or only to postpone the payment of it?

I am of opinion it is only to postpone the payment.

It is true, there is a distinction where a legacy is given to one at his age of twenty one, there it is not vested; but where it is to him, to be paid at twenty-one, it is vested; this distinction now is absolutely settled (1).

But there are cases where when a testator gives interest in the mean time, he gives a property in the principal, unless something arises on the face of the will to take off the force of it (2).

Where a testator gives interest on a legacy in the mean time, he gives a property in the principal, unless something appears on the will to take off the force of it.

Lord *Hardwicke* then read the will, and said, if the words when he shall have attained twenty-five, had been left out, and it had been, I give to *Claudius Fontereau* a thousand pounds, which I empower my executors, &c. to lay out at interest, and apply for his education, and to pay the residue at twenty-five, this would be annexed to the payment only.

There is a direction for disposal of part of the principal to put him out apprentice; for though the word is *empower*, yet it is obligatory upon executors to lay out one thousand pounds upon securities, and they may, if they please, take the greatest part of the principal for this purpose.

This is something like the case in Lord *King*'s time, of *The Attorney General* and *Hall* (3), where the testator gave a legacy to one for life, and so much as he did not dispose of, gave to a charity; it was held the legatee might dispose of the whole; so here, if for the legatee's benefit, they might take almost the whole to place him out apprentice; as if, for instance, they should put him to a *Turkey* merchant, where they insist upon a large sum with an apprentice. [646]

He directed the securities to be transferred to the father, who is the representative of the legatee (4).

(1) *Vide Steadman* v. *Palling*, *ante* 427.

(2) So *Collins* v. *Metcalfe*, 1 *Vern*. 462. *Cave* v. *Cave*, 2 *Vern*. 508. *Stapleton* v. *Cheele*, 2 *Vern* 673. *Pre. Cha.* 318. S. C. *Clobberie*'s case, 2 *Vent*. 342. *Van* v. *Clarke*, *ante* 1 vol. 512. *Neale* v. *Willis*. *Barn. Cha. Rep.* 43. *Hibert* v *Parsons*, 2 *Vef.* 263. *Green* v. *Pigot*, 1 *Bro. Cha. Rep.* 103. *Heath* v. *Heath*, 2 *Bro. Cha. Rep.* 3. *Walcott* v. *Hall*, 2 *Bro. Cha. Rep.* 305. *Dodson* v. *Hay*, 3 *Bro. Cha. Rep.* 404. Whether *maintenance* is equivalent to the giving of *interest*, *vide Pulsford* v. *Hunter*, 3 *Bro. Cha. Rep.* 416. *Atkins* v. *Hiccocks*, *ante* 1 vol. 501.

(3) 8 *Vin*. 103. pl. 50.

(4) *Reg. Lib. A.* 1747. fol. 521.

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The ecclesiastical court will decree payment of a legacy immediately, where it is devised to *A* to be paid at 21, and interest is given, otherwise if *without giving interest*, for there it will not accrue till the time comes at which the legatee would have been 21 if living.

If a legacy be devised to *A.* to be paid at twenty-one, and interest is given, the ecclesiastical court will decree payment immediately, the interest being for delay of payment, but if to *A.* to be paid at twenty-one, *without giving interest*, then interest will not accrue till the time comes at which the person would have been twenty one, if living (1).

(1) *Vide Heath* v. *Perry*, ante 102.

Case 254. *Le Neve* versus *Le Neve*, *December* 9, 1743, *The Cause stood for Judgment.*

S C Amb 436. 2 Ves 64.
The agent of the defendant having full notice of the first articles made on her husband's first marriage, this notice is likewise to her, and is sufficient equity in the plaintiffs to postpone the second articles and settlement, notwithstanding they have been executed.

LORD CHANCELLOR,

THE bill was brought by the plaintiffs *Peter Le Neve* and *Hugh P[illegible]t*, and *Elizabeth* his wife, late *Elizabeth Le Neve*, as the only surviving children of the defendant *Edward Le Neve*, by *Henrietta* his late wife, deceased.

The end of the bill was in general to have the execution of a trust of leasehold estates settled upon the late wife of *Edward Le Neve*, and the issue of that marriage, by articles previous to the marriage, dated *July* 1, 1718, and that the conveyances made by the defendant *Edward Le Neve* and the defendant *Mary* his wife, to two trustees, may be set aside, and delivered up as voluntary, being made after notice of the articles of *July* 1, 1718, or of the other conveyances made in pursuance thereof, and to have the leasehold estates exonerated and disincumbered.

The facts were, that in 1718, the defendant *Edward Le Neve* intermarried with his first wife *Henrietta Le Neve*, who had a considerable fortune, and articles were executed previous to the marriage, dated *July* 1, 1718, whereby the father of *Edward*, in consideration of *Henrietta*'s fortune, &c. covenanted with trustees, to convey to them several estates, and some leasehold, amongst the rest, near *Stepney*, in the county of *Middlesex*, to permit *Edward Le Neve* the younger to receive the rents and profits during his own life, and after his death, to pay to *Henrietta* 250 *l.* a year, in case she survived *Edward*, and after the decease of *Edward* and *Henrietta*, that the said estates should remain to their issue, in such manner as *Edward* the younger should by will or otherwise appoint, and for want of such issue, to the use of *Edward Le Neve* the father, and his heirs.

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The 10th of *June*, 1719, a settlement was made in pursuance of the articles.

The marriage took effect, and *Edward* and *Henrietta* had issue the plaintiffs *Peter* and *Elizabeth*, and *Henrietta* died in *July* 1740, leaving no other children.

Twenty-five years after the first marriage, *Edward Le Neve* entered into a treaty of marriage with the defendant *Mary*, and by articles dated *November* 16, 1743, previous to the marriage,

Edward,

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Edward, in consideration of such marriage, covenanted with the trustees, the defendants *Dandridge* and *Norton*, to convey these very leasehold estates near *Soho-Square* to them, their executors, &c. within three months after the marriage, in trust, to pay the defendant *Mary* out of the rents of these messuages, in case she survived him, a clear annuity of one hundred and fifty pounds for her life, for her jointure, &c.

The marriage took effect, and three months after, on the 20th of *January* 1743, a settlement was made pursuant to the articles.

The settled estate consisting of houses in *Middlesex*, was subject to the register act of 7 *Ann. c.* 20.

The second articles and settlement were registered, but not the first.

Edward Le Neve mortgaged the houses likewise.

The bill was brought in order to set the second articles and settlement out of the way, and that they may be postponed to the first articles and settlement, upon this equity, that the defendant *Mary Le Neve* had notice of them.

The counsel for the plaintiffs admit, that the registring the second articles and settlement have, in point of law, affected the leasehold estates, as the statute of the 7th of Queen *Ann.* gives the legal estate where the effect of the registring has placed it.

Then the question is, whether equity will enable the children of the first marriage to get the better of the defendant's legal right; and this will depend upon the question of notice.

First, whether it appears sufficiently, *Joseph Norton* was attorney for the defendant *Mary*, in the transaction of her marriage. [648]

Secondly, Whether *Norton* himself had sufficient notice of the first articles and settlement.

Thirdly, whether that will affect *Mary* as a purchaser, and postpone her articles and settlement notwithstanding the register act.

The *first* will depend upon the answer of the defendant *Mary*.

She has in general denied any notice of the first articles and settlement, till six months after the marriage, and says, "that "the defendant *Joseph Norton* was so far from being employed "as Solicitor for her, in transacting the business of the mar- "riage articles and settlement, that he had been for a consi- "derable time before employed as an attorney for *Edward Le* "*Neve* her husband; that being at the time of marriage con- "cerned for her husband, she was thereupon induced to place "confidence in him, and her husband assured her, he would "take care there should be a handsome provision made for her, "and recommended *Norton* as a proper person to prepare the "deeds, whereby such settlement was to be made upon her, to "which she consented, and that *Norton* assured her that he had "taken care to secure her one hundred and fifty pounds a year, "by way of jointure, and did not then, or at any time before "her intermarriage, give her any notice of any former settle- "ment."

It

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It has been insisted by the defendant *Mary*'s counsel, that *Joseph Norton* was not her attorney, or agent, but her husband's, and that the attorney for one party having notice, will not affect her with notice.

As in purchases, and especially in mortgages, the same counsel and agents are frequently employed on both sides, therefore each side is affected with notice, as much as if different counsel and agents had been employed (1).

I am of opinion she has admitted enough of her side to make him attorney or agent for her; for if she placed confidence in *Joseph Norton*, no matter on whose recommendation, if she relied enough on her husband to take his recommendation it is sufficient; or otherwise it would be mischievous and inconvenient, if this court was to take into their consideration from whom the recommendation comes; for in purchases, and more especially in mortgages, very frequently the same counsel and agents are employed on both sides, and therefore each side is affected with notice, as much as if, different counsel and agents had been employed.

It is material how far the cases have gone in this point, two have been cited, *Brotherton* versus *Hatt*, 2 *Vern.* 574. and *Jennings* versus *Blincorne and others*, 2 *Vern.* 609. the first was shortly this, *A.* makes three several mortgages to *B. C.* and *D.* and in the last mortgage *B.* is a party, and agrees, that after he is paid, he will stand a trustee for *D.* Decreed that *C.* should be paid before *D.* for all the securities being transacted by the same scrivener, notice to him was notice to *D.*

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See how far this goes, the same scriveners were witnesses, and ingrossed all the securities, and were in nature of agents for all the lenders, and very likely for the borrower himself, and notwithstanding it does not appear Mrs. *Hatt* had personal notice, " yet notice to the agent is notice to the party, and consequently they that lend last must come last, having notice of " what was before lent; and if any one, after notice, lend more " money, although they should obtain the legal estate, yet would " in equity stand affected with the notice, and be bound " thereby."

The second case was no more than this, " *Blincorne* having " notice of an incumbrance, purchases in the name of *Moore*, " and then agrees that *Moore* shall be the purchaser, and he accordingly pays the purchase-money, without notice of the " incumbrance; though *Moore* did not employ *Blincorne*, nor " knew any thing of the purchase till after it was made, yet " *Moore* approving of it afterwards, made *Blincorne* his agent *ab* " *initio*, and therefore shall be affected with the notice to *Blincorne*."

The last goes a great way, for *Moore* knew nothing of the transaction, and yet the court held, that his approving of it afterwards, made *Blincorne* his agent *ab initio*; this carries it further than the present, but the first is a clear authority.

These cases therefore sufficiently prove it is not at all material to the plaintiffs, on whose advice or recommendation the de-

(1) But see *Lowther* v. *Carlton*, *ante* 294. *Worsley* v. *Earl of Scarborough*, *ante* 2 vol. 241. *Warwick* v. *Warwick*, *ante* 392.

fendant *Mary* intrusted *Norton*, nor does it make any difference, that it is the recommendation of the husband, any more than of any other person.

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The second consideration will be, if it appears clearly that *Norton* was employed by the defendant *Mary*, then whether there is sufficient evidence of notice to him.

An objection has been taken by the defendant *Mary*'s counsel, that, as notice hath been denied by her answer, if it is sworn to by one witness only, that being but oath against oath, it cannot prevail to establish the fact.

Where a fact is denied by an answer, and sworn to by one witness only, that being but oath against oath, it cannot prevail to establish the fact, but then the denial must be clear, or otherwise it makes a difference (1).

*The general rule, to be sure is so, but it admits of this distinction; where the denial of a defendant is clear, it has been adhered to, but where the answer is not a positive denial of the same fact, but only as to part, as in the present case, as to the notice to herself only, it makes a difference.

Many cases where the court have decreed upon the testimony of one witness, when what he swears is uncontradicted by the answer.

And there are many cases where the court upon the testimony of one witness, whose credit is unimpeached, and what he swears uncontradicted by the answer, have decreed upon this single evidence.

The defendant *Mary* denies notice to herself, but whether there was notice to another person her agent she passes by, without giving any answer.

Denying notice as to herself only, is *a negative pregnant* there was notice to her agent.

This is a denial indeed as to herself, but is at the same time, what is called at law, a negative pregnant, that there was notice to her agent.

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As to the evidence of notice to *Norton*, it is extremely strong, for he swears, that he had notice of the first articles some time before the second marriage, and that he had then a copy thereof from the defendant *Edward Le Neve*, in order to take counsel's opinion thereon, how to be secure against the effect of them, and to contrive in what manner they might get the better of these articles, and therefore as to *Norton* there cannot be a stronger notice.

The third and last general question is, whether the notice to *Norton* will affect the defendant *Mary*, as a purchaser, and postpone her articles and settlement notwithstanding the register act.

This depends upon two things:

First, Whether any notice whatsoever would be sufficient to take from the defendant *Mary Le Neve* the benefit of the register act.

Secondly, Whether personal notice to the defendant *Mary* is requisite to postpone her, or whether notice to her agent is sufficient to do it likewise.

As to the first, it is a question of great extent and consequence.

The preamble to the statute of 7 *Ann. c.* 20. is in substance, "Whereas by the different and several ways of conveying lands, "&c. such as are ill disposed have it in their power to commit

(1) *Walton* v. *Hobbs*, *ante* 2 vol. 19.

"frauds,

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"frauds, and frequently do so, by means whereof several persons have been undone in their purchases and mortgages, by "*prior and secret conveyances*, and fraudulent incumbrances."

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Then comes the enacting clause, "That a memorial of all "deeds and conveyances, which after the 29th of *September* "1709, shall be made and executed, and of all wills and devises in writing, whereby any honours, manors, lands, *&c.* "in the county of *Middlesex*, may be any way affected in law "or equity, may be registered in such manner as is after directed; and that every such deed or conveyance, that shall at any "time after, *&c.* be made and executed, *shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee* for "a valuable consideration, unless such memorial thereof be registered, as by this act is directed before the registering of the "memorial of the deed or conveyance, under which such subsequent purchaser or mortgagee shall claim, *&c.*"

What appears by the preamble to be the intention of the act?

The intent of the register act to secure subsequent purchasers against *prior secret conveyances*.

Plainly to secure subsequent purchasers, and mortgagees against *prior secret conveyances*, and fraudulent incumbrances.

If a subsequent purchaser had notice of a prior conveyance, then that was not a *secret conveyance* by which he could be prejudiced.

Where a person had no notice of a prior conveyance, there the registring his subsequent conveyance shall prevail against the prior, but if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced.

The enacting clause gives a subsequent purchaser the legal estate, but it does not say he is not left open to any equity which a prior purchaser or incumbrancer may have.

The enacting clause says, *That every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, &c.* that is, it gives them the legal estate, but it does not say, that such subsequent purchaser is not left open to any equity, which a prior purchaser or incumbrancer may have, for he can be in no danger where he knows of another incumbrance, because he might then have stopped his hand from proceeding.

This case has been very properly compared to cases on the 27 *H.* 8. for the inrollment of bargains and sales.

That act was formed pretty much in the same manner with this.

The words of the enacting clause are, "That from, *&c.* no "manors, lands, tenements, *&c.* shall pass, alter or change "from one to another, whereby any estate of inheritance or "freehold shall be made or take effect in any person or persons, "*or any use thereof*, to be made by reason only of any bargain "and sale thereof, except the same bargain and sale be made by "writing indented, sealed, and inrolled, in one of the King's "courts of record at *Westminster*, or else within the same county, "*&c.* where the same manors, *&c.* so bargained and sold lie, *&c.*

"and

"and the ſame inrollment to be had and made within ſix "months next after the date of the ſame writings indent-"ed, &c."

Nor any uſe thereof ſhall paſs from one to another.

What is the meaning of this?

Before the making of the act any paper writing paſſed the uſe, from the bargainor to the bargainee, whereby great miſchiefs aroſe, for it intangled purchaſers, affected and injured the crown, and was contrary to the rule of law, which required notoriety in purchaſes, by feoffment and livery, &c.

But what has been the conſtruction of this ſtatute ever ſince? Why, if a ſubſequent bargainee has notice of a prior, he is equally affected with that notice, as if the prior purchaſe had been a conveyance by feoffment and livery, &c.

Under the ſtatute of inrollment of deeds, if a ſubſequent bargainee has notice of a prior, he is equally affected with that notice, as if the prior purchaſe had been a conveyance by feoffment and livery, &c.

The operation of both acts of parliament, and conſtruction of them are the ſame, and it would be a moſt miſchievous thing, if a perſon taking the advantage of the legal form appointed by an act of parliament, might, under that, protect himſelf againſt a perſon who had a prior equity, *of which he had notice.*

To let a perſon take advantage of the legal form appointed by an act of parliament, and protect himſelf againſt another, who had a prior equity of which he had notice, would be of miſchievous conſequence.

The caſes put by the Attorney General are very material.

Suppoſe (ſaid he) the defendant *Mary* had by letter of attorney empowered *Norton* to tranſact the affair with her huſband, and he, by means of this agency comes to the knowledge of the prior articles and ſettlement, would not this affect the principal.

Or, ſuppoſe a purchaſer of lands in a regiſter county, orders his attorney to regiſter it, and he neglects to do it, and then buys the eſtate himſelf, and regiſters his own conveyance, ſhall this be allowed to prevail?

It certainly ſhall not; for ſuch a perſon is out of the conſequences which the regiſter act guards againſt, of impoſition from *a prior ſecret conveyance*, as he had perſonal knowledge of the firſt.

There have been three caſes on the regiſter act.

Firſt, *Lord Forbes* and *Nelſon*.

Secondly, *Blades* verſus *Blades*, *Eq. Caſ. Abr.* 358.

Thirdly, *Chivall* verſus *Nicholls*, *December* 10, 1725, *in the Exchequer*. [653]

The firſt aroſe originally in *Ireland*, where there is a general regiſter act, and heard on an appeal to the Houſe of Lords in *England*, the 22d and 23d of *February* 1722 (1).

The Earl of *Granard*, father of Lord *Forbes*, was ſeiſed of a large eſtate, of which he was tenant for life, with remainder to

(1) *Forbes* v. *Deniſton*, 1 *Vez.* 67 S. C. 2 *Bro. Par. Ca.* 425.

his

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his first and every other son in tail, and had a power of leasing for lives at the best rent.

The register act in *Ireland* passed the 6th of Queen *Ann*.

Lord *Granard* granted a lease for three lives, at the rent of thirty pounds a year, but it was not registered.

His Lordship being greatly in debt, came to an agreement with Lord *Forbes* his eldest son, by the agency of Mr. *Steward*, to take upon him the payment of certain debts of his father, and to secure a jointure to his mother-in-law, and an annuity to his father.

The estate was conveyed to trustees, Mr. Justice *Doyne*, and Mr. Justire *Nutt*, during the life of the father.

Mr. *Steward* had notice of this lease during the treaty between Lord *Granard* and *Forbes*.

The conveyance to the trustees being registered, they brought an ejectment against the lessee of the lifehold estate, and it was heard before Lord *Middleton Chancellor* of *Ireland* in *February* 1721, who then made a declaration rather than a decree, that the conveyance was void, as against the lessee; it came on again before him the 17th of *February* 1721-2, and he then determined there was full notice of the lease to Lord *Forbes*, and awarded a perpetual injunction *from time to time*.

The judgment of the House of Lords was, that the said decree be reversed, and that all proceedings at law of the appellants against the respondents should, during the life of Lord *Granard*, be stayed, on lessees paying the rents, performing the covenants, *&c.* but that after the death of Lord *Granard*, Lord *Forbes* might be at liberty to try the tenants right to the lease.

The decree was reversed, not because Lord *Middleton* had proceeded on a wrong principle, but had drawn a wrong inference from it, for Lord *Forbes* did not insist merely on the register, but that the lease was made contrary to the power, and
[654] therefore the Lord Chancellor of *Ireland* was mistaken and wrong in decreeing the lease to be good in every respect; and the House of Lords set the decree right only as to this particular part, that after the death of Lord *Granard* the estate would determine, and therefore it was left open to Lord *Forbes* to dispute whether it was a lease pursuant to the power, but gave no relief as to the register act.

The case of *Blades* versus *Blades* came before Lord Chancellor *King* the second of *May*, 1727 (1).

William Blades in 1716, devised certain lands to his wife for her life, and after her death to his nine children; the wife enters, but does not register the will; the heir at law mortgages the estate, and the mortgagee has it registered, and upon a bill brought against him denies notice of the will, but it was proved in evidence that he had notice: and the court said, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered

(1) 1 *Eq. Ab.* 358. *pl.* 12. S. C.

was

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was a fraud: the design of those acts being only to give parties notice, who might otherwise without such registry be in danger of being imposed on by a prior purchase or mortgage, which they are in no danger of, when they have any notice thereof in any manner, though not by the registry, and that they would never suffer an act of parliament made to prevent fraud, to be a protection to fraud; and therefore decreed for the plaintiff, looking upon the transaction between the heir at law and the mortgagee to be collusive.

Lord *King* as inclinable to adhere to the common law as any Judge that ever sat in Chancery.

I mention this not only as a material authority, but as determined by Lord Chancellor *King*, whom we all know was as willing to adhere to the common law as any Judge that ever sat here.

The other case of *Chivall* versus *Nicholls* (1) was in the court of Exchequer, the 10th of *December* 1725, before Lord Chief Baron *Gilbert*, and is a clear authority for giving relief against the registry act, upon an equity of notice; but then there were charges of fraudulent circumstances besides, and therefore is not so similar to the present.

The ground of the determinations in these cases is, that the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser, and is a species of fraud, and agrees with the definition of *dolus malus* in the civil law.

Consider therefore what is the ground of all this, and particularly of those cases which went on the foundation of notice only; for Lord *Forbes* was on notice only, and notice too to the agent; the ground of it plainly is this, that the taking of a legal estate after notice of a prior right, makes a person a *mala fide* purchaser, (and not, that he is not a purchaser for a valuable consideration in every other respect), this is a species of fraud, and *Dolus Malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing * that, he takes away the right of another person by getting the legal estate.

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And this exactly agrees with the definition of the civil law of *Dolus Malus*, *Dig. lib.* 4. *tit.* 3. *Lex.* 2. *Dolum malum Servius ita definit, Machinationem quandam alterius decipiendi causa, cum aliud simulatur, & aliud agitur. Labeo autem, posse & sine simulatione id agi, ut quis circumveniatur: posse & sine dolo malo aliud agi, aliud simulari; sicuti faciunt, qui per ejusmodi dissimulationem deserviant, & tuentur vel sua vel aliena. Itaque ipse sic definivit, dolum malum* esse omnem calliditatem, fallaciam, machinationem, ad circumveniendum, fallendum, decipiendum alterum adhibitam. *Labeonis definitio vera est.*

A maxim in our law, that *fraus & dolus nemini patrocinari debent.*

Now if a person does not stop his hands, but gets the legal estate when he knew the right in equity was in another, *machinatur ad circumveniendum*; and it is a maxim too in our law, that *fraus & dolus nemini patrocinari debent.* *Co.* 3 *Rep.* 78. *b.*

If the ground is the fraud or *mala fides* of the party, it is all one whether by the party himself or his agent, still it is *machinatio ad circumveniendum*

Fraud or *mala fides* therefore, is the true ground on which the court is governed in the cases of notice, and it is a consequence of the decision of the former question, that notice to the agent is sufficient; for if the ground is the fraud or *mala fides* of the party, then it is all one whether by the party himself, or his agent, still it is *machinatio ad circumveniendum*, and

(1) 1 *Stra.* 664. S. C.

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the putting a copy of the first articles and settlement into *Norton*'s hands, to take the opinion of counsel in what manner they could be set aside, is a contrivance to circumvent.

It has been said, if this woman has been imposed on by her husband, she instead of cheating has been cheated.

He certainly who trust most ought to suffer most.

But then who ought to suffer, the person intrusting an agent, or a stranger who did not employ him? He certainly who trusts most ought to suffer most.

If the principal's being imposed on by his agent was admitted as an excuse, it would make all the cases of notice very precarious, for it seldom happens but the agent has imposed on his principal.

Mrs. *Hatt* the third mortgagee in the case in 2 *Vern.* mentioned before, was imposed on, and so was *Moore* in the other case reported there, clearly imposed on; and yet if this was to be any excuse, it would make all the cases of notice very precarious: for it seldom happens but the agent has imposed on his principal, and notwithstanding that, the person trusting ought to suffer for his ill-placed confidence.

Therefore in both respects as agent and trustee, notice to *Joseph Norton* is notice to the defendant *Mary* likewise (1); and also as to the registry act, here is a sufficient equity in the plaintiff to postpone the second articles and settlement notwithstanding these only have been registered (2); and his Lordship decreed accordingly.

(1) *Norris* v. *Le Neve*, *ante* 36. *Maddox* v. *Maddox*, 1 *Vej.* 62. *Ashley* v. *Baillie*, 2 *Vej.* 370.

(2) *Hine* v. *Dodd*, *ante* 2 vol. 276. note 2. *Sheldon* v. *Cox*, *Amb.* 624. *Cowp.* 712.

Case 225.

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Troughton versus *Troughton*, *February* 23, 1747.

1 Vef. 86. S. C.

Where there is a general power given or reserved to a person for such uses, &c. as he shall appoint, this makes it his absolute estate, and gives him such a dominion over it as will subject it to his debts.

HENRY Troughton the elder, the plaintiff's late father, agreed on the marriage of the plaintiff with his late wife, in consideration of the fortune the plaintiff would be intitled to, to settle certain freehold and copyhold lands on the plaintiff and his wife and their heirs; and on the third of *July* 1740, surrendered a copyhold estate at *Berkhamstead* in *Hertfordshire* to himself for life, remainder to the plaintiffs for their lives and the life of the survivor, remainder to the plaintiff his son in fee.

Henry Troughton the elder by lease and release dated the 3d and 4th of *July* 1740, conveyed to two trustees and their heirs, in consideraton of the marriage then intended between the plaintiffs, freehold lands at *Bayford* in *Hertfordshire*, to the use of himself for life, remainder to the plaintiffs and the survivor for life, remainder to their issue, remainder to the plaintiff his son in fee: *Henry Troughton* the elder covenanted for himself, his heirs and executors, with the trustees, that all the premisses were free from incumbrances, except the title of dower which his wife *Margaret Troughton* had in the freehold lands.

The plaintiff and his late wife, by their bond of the 4th of *July* 1740, became bound to *Henry Troughton* the elder in the penalty of 600*l.* to surrender within six months after the death of *Henry Troughton* the elder, a part of the copyhold premisses, to the use of such persons and for such estates as he should by deed or will appoint, or to pay the sum of three hundred pounds to such persons as he should by deed or will appoint; and in default of such appointment, to surrender such part of the copyhold premisses to his daughter *Ann Helena Troughton* in fee, or to pay her three hundred pounds, at the election of the plaintiffs, or the survivor. TROUGHTON v. TROUGHTON.

The plaintiffs soon after married, *Henry Troughton* the elder died the 24th of *November* 1741, having made his will, and thereby gave the part he had reserved of the copyhold premisses to his wife *Margaret* for life, remainder to *Ann Helena* his daughter in fee; or in case the plaintiffs would pay the three hundred pounds, he gave this in like manner, and made *Margaret* his executrix and residuary legatee, who proved the will, and possessed herself of the personal estate, and got into her custody the writings relating to the freehold and copyhold estates, and likewise the copyhold itself, though the plaintiffs gave notice they would elect to pay the three hundred pounds.

The plaintiffs discovered, just before the filing of their bill, that *Henry Troughton* the elder had, previous to the marriage of the plaintiffs on the 30th of *June* 1740, surrendered the copyhold premisses, to one *Sarah Runnington* for securing two hundred pounds and interest, which is still unpaid; and in *September* 1740, the plaintiff became bound with his father as a surety to *Sarah Runnington* for another sum of fifty pounds. [657]

The plaintiff has brought his bill against *Margaret* his mother-in-law, *Ann Helena* his half sister, and *Sarah Runnington*, to the end that what is due on the mortgage of the copyhold estate may be paid out of the assets of *Henry Troughton* the elder, and that the principal and interest due on the bond to *Sarah Runnington* may be also paid thereout, and that the defendant *Margaret* may be injoined from putting the bond in suit given by the plaintiffs for payment of the three hundred pounds and interest.

The defendant *Ann Helena Troughton* sets forth by her answer that *Henry Troughton* the elder, subsequent to his will, by deed poll of the 28th of *July* 1741, reciting his power, and in consideration of his love for his daughter, and for making a provision for her after his decease, appointed that the plaintiffs, or survivor of them, should within six months after his decease surrender the copyhold premisses to the use of *Ann* and her heirs, or else pay three hundred pounds to the defendant *Ann*, her executors or administrators, the said premisses to be surrendered, or three hundred pounds to be paid at the option of the plaintiffs; and by deed of equal date, for the better inforcing the deed of appointment, assigned the bond given by the plaintiffs to a trustee, his executors, &c. in trust for the use of the defendant *Ann Helena Troughton*.

 And

TROUGHTON
TROUGHTON.

And insists, that the deeds of appointment and assignment in trust for her, are a revocation of so much of her father's will as purports to be a devise of the copyhold messuage, or of the three hundred pounds to be paid in lieu thereof, and that she is now absolutely intitled to the benefit of the alternative, in the condition of the bond mentioned, at the election of the plaintiffs, free from all incumbrances, and to the profit or interest due for the same from the testator's death.

The defendant *Margaret*, insists that she is not obliged to pay the three hundred pounds, or any part of it, towards satisfying *Sarah Runnington's* mortgage, or bond debt, but is willing to apply the personal assets of the testator *Henry Troughton*, as far as they will go, towards the payment of the mortgage and bond.

Mr. *Brown* for the plaintiff argued, that the three hundred pounds was to be considered as assets of the father, as it was ab-
[658] solutely in his power, and that the court ought to intercept this money for the plaintiff's benefit, notwithstanding the appointment; and for this purpose cited the case of *Baintain* versus *Ward*, *April* 24, 1741 (1).

There *George Ward* having a power to charge his wife's estate with two thousand pounds by will, gives 500*l.* apiece to his two sisters, and died in debt to the plaintiff.

The question was, whether that appointment should defeat the creditors from having satisfaction out of the two thousand pounds, as part of the testator's personal estate.

Your Lordship was of opinion, this ought to be considered as the personal estate of *George Ward*, and that where there is a general power given or reserved to a person for such uses, intents and purposes, as he shall appoint; this makes it his absolute estate, and gives him such a dominion over it as will subject it to his debts; and decreed the creditors should have the benefit of it.

He likewise cited *Jordan* versus *Savage*, the 17th of *November* 1732.

Mr. *Capper* of the same side mentioned the case of *Hinton* versus *Toy*, the 30th of *November* 1739, before Mr. *Verney* at the Rolls (2).

There Doctor *Broughton* charged his estate with 300 *l.* to the wife of *A.* for life, to the husband for life, and to the issue of the marriage, and in case of failure of issue, then to such person or persons as she should direct by any appointment of hers, and for want of such apointment to her heirs.

The wife executed a power to the husband to dispose of this sum which she directed to be paid to her husband, to be employed by him to such charitable uses, *or to such other purposes as he should think fit.*

(1) *Ante* 2 vol. 172. S. C. and cases cited there. (2) *Ante* 1 vol. 465.

The

The husband disposed of it by will among his own relations. TROUGHTON v. TROUGHTON.

The question was, whether the three hundred pounds was to be considered as part of the estate of the husband, and liable to satisfy his creditors.

The Master of the Rolls, (Mr. *Verney*) said, "The only "doubt was, upon the words *charitable uses*, which shews the "wife had some wish it might be so employed; but the latter "words absolutely leave it to the husband's discretion whether "he will dispose of it in charity, so that there cannot be a "stronger instance to prove ownership; and the creditors do [659] "not resort to the will, but shew by the appointment, that their "right commences from the wife's execution of the power; and "there never was a construction in favour of legatees to the "prejudice of creditors, unless the creditors found their right "under the will itself."

His Honor decreed it to be assets of the testator, and said, that it ought to be applied to the payment of his debts, unless there is a sufficient fund out of the rest of the personal estate to discharge them; if so, the legatees' right under the will is preserved to them.

Mr. Attorney General for *Ann Helena Troughton*, the daughter, stated it, that she had no other provision but this appointment, that the sum of three hundred pounds upon the face of the articles ought to be considered as a provision for a younger child, and so intended by all the contracting parties.

That the father's appointment does not alter the case, for if he had made none, in default of that it would have gone to the daughter, and therefore cannot properly be said to be his assets.

LORD CHANCELLOR,

The plaintiff has a plain equity to come into this court to have the mortgage and bond to *Sarah Runnington* disincumbered out of the father's assets both real and personal, and likewise out of the three hundred pounds, so far as it can be considered part of the marriage agreement.

With regard to the fifty pounds bond, it appears the son was only a surety for his father, for he had the whole money, and therefore the son intitled to be reimbursed out of his father's assets.

The question is *first*, Whether the mortgagee is intitled to tack the fifty pounds bond to the mortgage.

If a mortgagor after making a mortgage borrows money of a mortgagee upon bond, and the mortgaged premisses descend upon an heir at law, or come to a volunteer, the court will not suffer them to redeem the mortgage without paying the bond, *because* it would occasion *a circuity*, by putting the obligee to sue for it out of the same estate, which are assets in the hands of the heir or volunteer (1).

But where a person claims the equity of redemption as a purchaser for a valuable consideration, without notice of the

Where there is a purchaser for a valuable consideration, without notice of a mortgage, the mortgagee cannot tack his bond to it, and can only have it out of the general assets of the mortgagor.

(1) *Powis* v. *Corbet*, ante 556.

TROUGHTON v. TROUGHTON.

mortgage, the mortgagee cannot tack his bond, because in such a case the estate would not be liable to the bond debt, and therefore is intitled to have it only out of the general assets of the father (1).

The next question is, how far the three hundred pounds that is charged by a disjunctive charge on the copyhold estate is liable to indemnify the plaintiff against this mortgage.

I am of opinion the plaintiff is intitled (if the real and personal assets of the father are not sufficient) to be reimbursed the residue out of the three hundred pounds.

In consideration of the agreement the father had entered into upon the marriage of his son, the son binds himself to reconvey the copyhold estate to the use of such persons, and for such estates, as the father should by deed or will appoint, or to pay three hundred pounds; *and in default of such appointment to surrender such part of the copyhold premisses to* Ann Helena Troughton *in fee, or to pay her three hundred pounds.*

This was part of the consideration, which was to move from the son, in return for the conveyance from the father of the freehold estate, &c. and his covenant that all the premisses comprised in the articles were free from incumbrances.

Then it will come to this question, whether the father, or any person claiming from him, shall take back this part of the estate, without the son's having the benefit of the agreement between him and his father.

It would be contrary to all rules, for each person where there is an agreement must perform his part thereof.

It has been said, this was to provide for another child a daughter, and therefore insisted she is to be considered equally as a purchaser with her brother, and has, by the counsel for her, been put on the same footing as a child intitled to a portion under a marriage settlement.

And to be sure, a father and eldest son are not intitled to affect younger childrens' portions by any incumbrance they may have brought on the estate afterwards.

But here the father might have directed the three hundred pounds to be reconveyed to his wife, or a stranger; and his making it a provision for his daughter, is a secondary consideration only.

Could the wife, or a stranger, if appointed to them, have taken this three hundred pounds without applying so much as would discharge the mortgage? most certainly not!

[661]

And though it is true, that in default of appointment it was to go to the daughter, yet the father might have disappointed her totally, as the whole was intirely at his pleasure.

If indeed the only condition of the bond had been, that the brother should convey part of the copyhold estate to the defen-

(1) *Coleman* v. *Winch*, 1 P. W. 776. *Archer* v *Snatt*, 2 Stra. 1107.

dant *Ann Helena Troughton* his half sister, or pay her three hundred pounds, something plausible might have been urged for her.

There were but three days difference in point of time between the mortgage and the settlement, when the father contracts with the son to reserve to himself a power of disposing of three hundred pounds, and conceals from his son the mortgage, and suffers the incumbrance to continue, and does not redeem it.

But as this was intended to be a provision for his daughter, the rest of the father's assets ought to be first applied in discharge of the mortgagee's principal and interest.

Lord *Hardwicke* therefore referred it to a Master to take an account of what is due to *Sarah Runnington* for her mortgage, and on the plaintiff's payment of the principal, interest and costs, *Sarah* is to convey and assign the mortgaged premisses to the plaintiff.

In case the plaintiff should redeem the mortgage, then the master is to carry on the account of subsequent interest for what shall be so paid to the mortgagee.

The master is also directed to take an account of what is due to *Sarah Runnington* for principal and interest on her bond, and to tax her costs so far as relates to the bond.

And on the plaintiff's paying principal, interest and costs on the bond, the defendant *Sarah Runnington* is to deliver it up to the plaintiff.

And in case the plaintiff shall pay the principal, interest and costs on the mortgage, he declared the plaintiff ought to be considered as a specialty creditor on the estate of his father, for so much as he shall have paid for principal, interest and costs on the mortgage.

The Master is likewise to take an account of the personal estate of the testator, *Henry Troughton*, received by *Margaret* his executrix, and such personal estate is to be applied in paying and reimbursing to the plaintiff what shall be so paid by him to *Sarah Runnington* for principal, interest and costs on the bond, and in paying and reimbursing to the plaintiff what he shall have paid to *Sarah Runnington* for principal, and interest on the mortgage in a course of administration. [662]

And in case the personal estate of the father shall not be sufficient to satisfy and reimburse the plaintiff what shall be so found due to him, for what he shall have paid to *Sarah Runnington* for principal, interest and costs on the mortgage, together with subsequent interest and costs of the reconveyance, then he declared the plaintiff is intitled to have the deficiency made good by retaining so much out of the sum of three hundred pounds, and interest after mentioned.

And then his Lordship directed the bond for three hundred pounds to carry interest at the rate of four and a half *per cent.* from six months after the testator's death, and that this should be applied to satisfy the plaintiff so much as shall not be satisfied out of the father's personal estate.

 And

And on the plaintiff's paying the residue to the defendant *Ann Helena Troughton*, she was directed by *Lord Chancellor* to deliver the bond and appointment to be cancelled.

Case 256. *March 21, 1747. The Attorney General at the relation of Robert Mapletoft, Batchelor of Arts, born at Byefield in the County of Northampton, and Scholar of Clare-Hall in Cambridge,* } Plaintiff.

The Master, Fellows and Scholars of Clare-Hall, and William Talbot, ——— } Defendants.

1 Ves. 78. S.C. There are no particular words required in a donation to a college to create a visitor, it is sufficient if the intention of the founder appears who should be visitor, and technical words are not necessary.

THE case as stated by the plaintiff's bill was, *John Freeman* of *Billing* in the county of *Northampton*, Esquire, by his will in 1615, directed two thousand pounds to be laid out by his executors, in purchasing one hundred pounds a year lands of inheritance, the rents of it to be employed and distributed towards the maintenance of ten poor scholars in the university of *Cambridge*, at or in the house or college called *Clare-Hall*, in the university for ever; *viz.* To two poor fellows, *there to be placed* by my foundation, the sum of twenty five pounds apiece, and to eight scholars the sum of 5 *l.* a year, *my kinsmen, if any be, to be the first preferred,* and *next to them, those that are born within the county of* Northampton, and *next to them, those that are born within the county of* Lincoln, that shall be fit for the same; the further perfecting thereof I leave to my executors. [663]

The executors in pursuance of the will laid out two thousand pounds in the purchasing lands of inheritance of the yearly value of one hundred pounds and upwards, and the then master and fellows having accepted the said donation upon the terms and conditions on which the same was given by the testator, the executors thereupon executed a deed in 1622, to which they were parties of the one part, and the master and fellows of *Clare-Hall* of the other; and this deed hath been ever since the execution thereof in the custody of the master and fellows, and the purchased lands were thereby limited and settled for the perpetual establishment and endowment of two fellowships, and eight scholarships, upon the foundation of *John Freeman* the testator.

From the year 1622 to 1726, the master and fellows of *Clare-Hall* pursued the intent and meaning of the foundation, without deviating in one single instance; for during the first hundred years, every person elected into the said fellowships or scholarships was either of the testator' blood or kindred, or born in the counties of *Northampton* or *Lincoln*.

The first fellow chosen in the college contrary to the will was in 1726, and there has been the same innovation from that time for the last twenty years in every subsequent election.

Thomas

Thomas Neal, a fellow upon Mr. *Freeman's* foundation, in 1743 resigned his fellowship, whereupon the relator, then a batchelor of arts, and born at *Byfield* in *Northamptonshire*, offered himself a candidate, and though there was no other candidate of *John Freeman*, the founder's kindred, or of any person born in *Northamptonshire*, or *Lincolnshire*, in which case the relator, by virtue of the propriety of the foundation, was intitled to be elected into the said fellowship without the admission of any competitors, not qualified as aforesaid, yet the master and fellows put the defendant *William Talbot*, a person not related to the founder, and born in the county of *Bedford* into nomination and competition for the fellowship, and he was upon the 19th of *April* 1744, elected into the said fellowship by the master and fellows.

The plaintiff insists that the election of the defendant *William Talbot* into the vacant fellowship of the testator *Freeman's* foundation, being made in direct contradiction to the express terms of the donation, is as such *ipso facto* a null and void election, and the relator having been the only competitor for the same, who was duly qualified according to the intent of the founder, and no objection of unfitness imputed to him, the vacant fellowship ought to have been conferred upon the relator, [664] not barely in preference to, but in exclusion to the defendant *Talbot*, who never was qualified to be a competitor fo the same.

And therefore has brought his bill, that the propriety of the said foundation of two fellowships, and eight scholarships, pursuant to the will of *John Freeman*, may be asserted and established by the decree of this court, and that the fellowships and scholarships may, according to the true intent and meaning of the founder, be declared to have been absolutely appropriated to, and belong in the first place to the testator's kinsmen (if any there be), and next to them, to those that are born within the county of *Northampton*; and next to them, those that are born within the county of *Lincoln*, and shall be fit for the same; and that the election of the defendant *William Talbot* into the fellowship vacant by the resignation of *Thomas Neal* may be superseded, and set aside, and the relator forthwith admitted to and instated in the same; and that the defendant *William Talbot may come to an account with, and make full and adequate satisfaction to the relator for the profits, emoluments and advantage which might have been made by him, by virtue of the said fellowship, during his possession and enjoyment of the same.*

The defendant *William Talbot*, as to so much of the information as seeks any relief in all the several matters therein mentioned, pleads, that *Edward* the Third, in the 20th year of his reign, by letters patent under the great seal, granted licence to *Elizabeth de Burgo*, then Lady *de Clare*, to found and endow the college or hall called *Clare-Hall*, in the university of *Cambridge*, for the perpetual maintenance and subsistence of a master,

 divers

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divers fellows, and scholars in the said college or hall, who should apply themselves to the study of learning.

That *Elizabeth de Burgo* Lady *Clare* did, in pursuance of the licence, found *Clare-Hall* accordingly; and they were by *Edward* the Third's letters patents incorporated by the name of the *Master, Fellows* and *Scholars* of *Clare-Hall*.

That the foundress of *Clare-Hall*, for the better regulating the master, fellows and scholars, did make divers statutes and ordinances to be perpetually observed; and among the statutes there is one *de amotione magistri*, which says, "Si magister dictæ domus "fuerit convictus legitime super crimine homicidii adulterii, &c. "vel in ipsius cura & regimine negligenter & dolose sit versatus, "&c. a suo magisterio sit merito amovendus, et cancellarium "(cujus jurisdictioni visitationi correctioni & punitioni in "omnibus prædictum magistrum qui pro tempore fuit "subjaceri) volumus aut prædicti cancellarii locum tenen- [665] "tem, proviso tamen semper quod duo doctores vel magistros "a dicta universitate ad hoc eligi volumus et etiam assignari "dicto cancellario vel ejus locum tenenti assideant in omni "processu contra magistrum dictæ domus, ad ipsius amotionem "ex dictis causis, vel earum aliqua faciendam habita prius "super causa aut causis amotionis hujusmodi coram eodem "cancellario aut ipsius locum tenente et dictis doctoribus aut "doctore et magistro vel magistris cognitioni sententialiter *et* "*definitive et summarie et de plano sine figura judicii et etiam sine* "*scriptis cum et de consilio et assensu dictorum magistrorum et doc-* "*torum a suo magisterio volumus amoveri* nullo eidem magistro "sic amoto appellationis vel alio juris communis vel specialis "remedio contra hujusmodi amotionis sententiam quo modo "libet valituro Quod si magister a suo magisterio sic amotus "ab hujusmodi amotionis suæ sententia ad quemcunq; judi- "cem qualitercunq; appellare vel aliud quodcunq; remedium "juris communis vel specialis exercere vel facere exerceri aut "quicquam aliud facere presumpserit, &c. volumus & statui- "mus ut rata et irrevocabili manente sententia supradicta a "statu quem prius habuit in domo prædicta et omni commodo "quod in câ et ex câ fuerat percepturus *penitus sit privatus*."

That amongst the said statutes there is another intitled *De potestate magistri in socios, &c.* which says, "Item socios, dis- "cipulos, et ministros, dictæ domus ipsius magistro imme- "diate volumus esse subjectos, adeo quod ipse possit & debeat "pro suis excessibus corripere & corrigere, ac etiam si suorum "excessuum qualitas hoc exegerit, a dicta domo et ipsius so- "cietate ac commodo quocunq; exinde competente eisdem "*summarie et de plano absq; strepitu et figura judicii sine scriptis* "*amovere penitus et privare*.

"Si autum magister modum in præmissis excedat aut alicui "de dictis sociis, in præmissis vel aliquo eorundem gravamen "inferat aliquale, licere volumus hujusmodi gravato ad audi- "entiam dicti cancellarii, sive procancellarii solummodo ap- "pellare, &c."

That

That amongst the said statutes, there is another intitled, *De electione statutorum*, which says, "Item volumus quod dictus "cancellarius magistrum et omnes socios et singulos domus "prædictæ annis singulis si opus fuerit poterit visitare, et si "quis inter eos repererit corrigendum illud cum assensu duo- "rum doctorum vel magistrorum prout in consimilibus supe- "rius est expressum debite juxta juris et nostrorum statutorum, "&c. exigentiam corrigat et puniat."

That amongst the statutes which are intitled, *Regulæ de Clare*, there is one intitled, *De modo divina officia celebrandi*, which says, "Si quid post mortem nostram de dictis nostris statutis, &c. "dubium et emerserit vel obscurum quod per magistrum et "socios dictæ domus vel majorem et saniorem partem eorum "nequeat concorditer terminari volumus quod per dictos ma- "gistrum et socios cancellario dictæ universitatis vel ipsius [666] "locum tenenti absq; moræ dispendio plenarie referatur ut "ipse concellarius aut ejus locum tenens una cum et de consilio "et consensu duorum doctorum (si fuerint) alioqui duorum bac- "calaureorum, &c. hujusmodi dubium vel obscurum interpre- "tetur et declaret, &c.

"Per ea vero quæ nobis dum in hac vita fuerimus supra "duximus reservanda nostris hæredibus post nostrum decessum, "jus aliquod quantumcunq; eis vel eorum aliquo usi fuerimus "adquiri nolumus ullo modo."

The defendant avers that the said statutes are all which any ways relate to the constitution of a visitor of *Clare-hall*, nor is there in any deed or writing, any thing which relates to the appointment of a visitor of *Clare-hall*, save as aforesaid, and insists that the chancellors for the time being of the said university, have been ever since the visitors of the said hall, and that the chancellor for the time being, his deputy or vice-chancellor, hath (with the advice and consent of two doctors, if any such there be, or otherwise of two masters of arts, one a regent, and the other a non-regent master) heard, adjudged and determined, and of right ought to hear, adjudge and determine all disputes, complaints and controversies concerning the election and admission of any person into the place of one of the fellows or scholars of the said college, and that such controversies, &c. have not been, and ought not to be heard, adjudged or determined before any other court, or judicature, or in any other manner whatsoever.

That at the time of the election of the defendant, the Duke of *Somerset* was, and yet is the chancellor, and visitor of *Clare-hall*; and that the relator *Robert Mapletoft*, hath not appealed to the said chancellor as visitor of the college, or hall, to hear and determine the right of election, as he might, and ought to have done.

That the said chancellor hath power and authority to compel the defendant to make a full answer upon oath, to all such matters as shall be complained of against him, touching the election of fellows into the said college or hall, and also to inforce a production of all statute books, &c. relating to any

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controversy concerning the election or admission of the defendant, or the relator *Robert Mapletoft*, into the place of one of the fellows of the said college or hall.

And prays the judgment of the court, whether he ought to be compelled to make any other answer, or whether the court ought to proceed any further in the suit.

[667] Mr. Solicitor General for the defendant.

This is a plea of great consequence to both universities.

The first question is, whether the plea doth sufficiently put in issue that *the Chancellor* is the general visitor of this college.

Secondly, whether the ingrafted fellowships are subject to the same statutes and rules with the original fellows.

In the original foundation *Elizabeth de Clare*, the foundress, reserves a power to herself during life to construe her own statutes, and afterwards that *the Chancellor* shall have the power of construing the statutes, if any doubt arises, which alone, if it rested there, would give him the whole visitatorial power; but it requires him further to visit the master, and all and singular the fellows of the college once a year.

It appears too, that upon an appeal to the chancellor, he has adjudged accordingly, and that he has a power to order all books and papers to be laid before him, without the assistance of this court, and your Lordship in several instances, as a visitor, has ordered it to be done in the same summary manner.

There are very few foundations in either university which have not had ingraftments upon them, and whoever founds new fellowships, that fellow, from the moment of his ingraftment, must be subject to all the statutes on the original foundation.

Here the relator claims to be a fellow, and such a fellow as may be chosen master, so that he is not to be taken as totally distinct from other fellowships.

Though a visitor should do him injustice by this final determination without appeal, yet it is better to submit to this inconvenience, than let questions of learning be debated *strepitu, et scriptis fori extranei*.

In the case before your Lordship, about four years ago, upon the foundation of *William* of *Durham*, of new fellowships, by way of ingraftment upon University college, as that was a society of royal foundation, your Lordship, upon appeal, determined it as a visitor in a summary way, and would not suffer it to go on in the course of charity causes, as it would be of very bad consequence, by opening a door to the courts here, to interfere in a matter of this nature.

[668] Mr. *Clark* of the same side; the plaintiff claims merely on his being born in the county of *Northampton*, and sets up a right to be admitted a fellow under Mr. *Freeman*'s foundation.

A clear substitution of a general visitor by the foundress, in *Regula de Clare*, and the statutes, to act in her room *in perpetuum*.

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In Doctor *Bentley*'s case (1), upon the construction of the statutes of *Trinity* college, Lord *Raymond* held, the visitor had a jurisdiction over the members of that society, even to expulsion; and that notwithstanding there were no express words appointing a visitor, yet this was implied from his power.

In the case of *The King* against *The Warden of All-Souls College in Oxford*, Sir *Thomas Jones* 174, on a mandamus to admit *Ayloffe* a fellow, he returned the charter of foundation; and that the archbishops for the time being were perpetual visitors of the said college; and that *Ayloffe* had not appealed to the archbishop, as (*de jure potuit & debuit*) and demanded judgment, whether he should be compelled to make any other answer; and though it was objected, that no power is given to any visitor, on a matter of admission, or refusal, though it be done in case of correction or removal, it was answered, that the power of correction and removal being a very great power, the other is incidentally given; and that the constitution of the visitor *eo nomine*, gave a power; and the question here being, whether the return is good, or the court may proceed further? It was resolved, the return is good, for by the appointment of visitors, they are made sole judges, without appeal; and that Lord *Hale* said, in the case of Doctor *Roberts*, on a *mandamus* to be restored to the place of a fellow in *Jesus college* in *Oxford*, that there was no remedy against the judgment of the visitor, though unjust, or though he refuse to accept an appeal.

Mr. *Wilbraham* of the same side.

Nothing is more established in courts of law, than that they will not proceed on a *mandamus* to restore a fellow, upon a return made, that there is a visitor.

In the case of *Philips* versus *Berry* (2), 1 *Ld. Raymond* 5. Lord Chief Justice *Holt* said, "That a corporation constituted for "a private charity, is intirely private, and wholly subject to "the rules, laws, statutes and ordinances which the founder "ordains, and to the visitor whom he appoints, and no others; "and that the office of visitor is to hear appeals of course, and "from him, and him only, the party grieved ought to have "redress; and in him the founder hath reposed so intire con"fidence, that he will administer justice impartially, that his "determinations are final, and examinable in no other court "whatsoever."

Then the question will be, Whether these ingrafted fellowships shall be governed by the same statutes and laws with the original fellowships. [669]

One of the ingrafted fellows is now a Master of the college, and yet the plaintiff would have them governed by different laws, this is absurd, because there must be then two laws, and if subject to the statutes in common acts, preaching, doing exercise, &c. why not equally subject to the visitatorial power?

(1) 1 *Stra* 557. (2) 2 *Term Rep.* 346. S. C.

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The fellowships, one with another, in the universities, are not of great value, perhaps not above 24*l.* or 25*l.* a year, and therefore, if liable to be brought before courts of justice in *Westminster-Hall*, they had better sit down contented with any grievance than defend themselves.

The plaintiff says, he hath a *right to be chosen*, exclusive of all other persons, which is putting it upon a footing like a *conge d'lire* for a bishop.

In common sense, *a right to be chosen*, does in itself imply a competition.

A plea of a visitor never came before the court till now, and is a jurisdiction in a summary way unappellable, and if not allowed, would introduce a great mischief to both Universities, and therefore hoped this is a good plea.

Mr. *Attorney General* for the plaintiff.

The defendant is not a founder's kinsman, nor within the county of *Lincoln* or *Northampton*.

I will not dispute, that where a visitor is clearly appointed by statutes, this court will not interpose, but do insist, in the present case, here is no general visitatorial power.

First, As to the removal of the Master, it is plain from the general tenor of the statutes it is not a general visitatorial power, but given to the Chancellor and two Doctors to amove him, and not to determine as to the choice whether duly appointed, and therefore meant only to subject him to such censure as he might deserve for his bad conduct.

The annual visitation intended to go no further than to any of the crimes the parties might have been found guilty of, and amounts to this, that the Chancellor of the university shall visit twice a year, and punish for those particular crimes, and shall not hurt the power of the Master, as to any future act.

[670] The rules of the statutes do not extend further than the corporate body extend, and therefore no person who is not of that corporate body can be subject to these particular rules.

The present foundation depends on a particular will, and the laws and rules of the testator are the measure by which it is to be governed.

Mr. Solicitor General says, there are few colleges without new ingraftments, but unless those ingraftments are by applying to the crown incorporated into a particular body, they are not to be considered as a part of the body; and therefore I speak of my own knowledge, that there have been frequent applications to the crown for such an incorporation.

It is not said by the will of Mr. *Freeman*, that his fellowship should be subject to the laws of lady *de Clare*.

In the case mentioned of University college, it was determined the petitioner ought to have been chosen as the only qualified person, though his competitor had the majority of voices; both parties there agreed the crown was visitor, and therefore this point was not debated, how far a new ingraftment is subject to the same visitatorial power with the original foundation, so that it

it must depend on a different rule, and be construed in a different way. ATTORNEY GENERAL v. TALBOT.

As to the argument of inconvenience, there is a much greater on the other side; is it none, that there should be an arbitrary final determination, and subject to no appeal whatsoever?

Mr. *Brown* of the same side.

This is a particular foundation, and for 100 years together Mr. *Freeman's* direction for the government of these new creations were followed, and afterwards there was an endeavour to incorporate them into the old fellowships, but nothing has been shewn that these fellowships have any more connection with *Clare-hall*, than with the fellowships of another college.

It is not averred there is any visitatorial power with regard to elections, but only with respect to the conduct of the fellows, where they are guilty of crimes to be corrected by the Master, and by appeal from him to the visitor.

They rely on the clauses in the *statute de lectione statutorum*.

A visitor may be appointed with a partial power by a founder, and yet not have a general visitatorial power, that he should *corrigere & punire*, that is in the particular instances before mentioned, and therefore insisted this is merely confined to such particular power. [671]

But whatever may be the construction of the visitatorial power with regard to the original foundation, the question is, Whether it ought to be extended to this particular case.

Mr. *Freeman* might have made the Chancellor visitor equally as in the original foundation; he has not done it in express words; can it be said then there is any necessary implication the Chancellor was to be a visitor here? I know of no instance where it has been determined a person is visitor by implication only.

Mr. *Freeman* by his will makes them no more than bare trustees to elect such persons as he directed should be electable, and while resident they were to be under the government of the college, but there is no right to chuse fellows unless they come to be commorant there.

The plea should have averr this was one of the fellowships of that college, and there is no allegation that the plaintiff was a fellow of that college; Mr. *Freeman* himself does not call them Fellows of that college, but Fellows of *his* society.

There is an instance in the very same college, reported in 5 *Mod.* 421. Mr. *Jennings's* case of *Clare-hall*: The counsel moved upon a return to a *mandamus* to the Master and Fellows of *Clare-hall* to restore *Jennings* to his fellowship on Mr. *Dickins's* foundation. They return their several statutes, &c. and that by one of them the Chancellor is nominated to be their visitor, and therefore the Master is not obliged to admit Mr. *Jennings* to his fellowship, there being a visitor.

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The counfel, who argued the return was infufficient, faid, the ftatutes of lady *de Clare*, who puts the Mafter and Fellows founded by her under the power of the Chancellor, does not fubject thofe fellowfhips which were founded afterwards to his power; and therefore fince there is no other remedy, prayed a peremptory *mandamus*.

E contra it was faid, whether Mr. *Jennings* be or be not duly elected, the examination of it does not belong to this court, but to another jurifdiction; and here being a vifitor appointed by the ftatutes, this court will not interpofe.

The point was not abfolutely determined; but the Chief Juftice faid, How can they bring in ftrangers, and make them fub-[672]ject to the reftrictions impofed by the founder? Though there be a vifitor for the fellows founded by lady *Clare*, yet whether this vifitor fhall be extended to the new Fellows, is the queftion; and whether there muft not be a new incorporation of the fecond fellowfhip founded by *Dukins*.

This is not a new doubt then, but arofe upon this very cafe of *Clare-hall*, and therefore it is too hard to determine in a fummary way; that it is in the Chancellor as vifitor when there has never been any incorporation of thefe fellows, and that this is not confequently fuch a property as is within the general vifitatorial power, fuppofing there is fuch a power.

The plaintiff's counfel read the charge in the bill, to fhew that for 100 years together, from the firft foundation of Mr. *Freeman*, the Mafter and Fellows of *Clare-hall* inviolably obferved the rules of Mr. *Freeman* the founder of the new fellowfhips.

Another charge was read to fhew, that the Mafters and Fellows of this college did not attempt till a long courfe of years to incorporate thefe new fellows as part of the college, but always confidered them as diftinct.

Mr. *Yorke* of the fame fide.

A charitable foundation is not to be governed by the rules of another foundation, unlefs fome reference is made by the founder to thofe rules: when *focii*, fubject to the rules of the founder of *Clare-hall*; but this is is a queftion previous to their election, and therefore ftands upon another ground.

If the relator had gone before the vifitor, there is a great doubt whether the vifitor would have admitted of the appeal to him in this cafe, becaufe if a vifitor admits of an appeal where he has no right to determine it, he is liable to an action, and fo laid down in the cafe of *Philips* verfus *Bury*, 2 *Lutw.* 1566. "Where "a founder of an eleemofynary foundation appoints a vifitor, "and limits his jurifdiction by rules and ftatutes, if the vifitor "in any fentence exceeds thofe rules, an action lies againft "him; but it is otherwife where he miftakes in a thing within "his power, though in this cafe there be not any appeal over."

LORD CHANCELLOR,

I have received fatisfaction enough at prefent to determine this plea, but not to make a final determination, for the relator is not precluded from entering into proof to falfify the plea.

It

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It is a case of great consequence to the colleges in the Universities, who have had many litigations about the powers and rights of visitors, and how far the courts of justice have a jurisdiction in these matters; and if a determination should be hastily made that colleges are liable to informations in this court, on the foot of general charities, and accountable for misapplications and abuses, I am afraid it would open a door to great vexation and expence.

The first question is, Whether by the plea it is sufficiently shewn here is a general visitor of this college?

Secondly, If that visitatorial power extends to Mr. *Freeman's* donation?

As to the *First*, it appears very clearly to me there is a general visitor of the college called *Clare-Hall*, under the statutes of *Elizabeth de Burgo* Lady *Clare*.

Instead of creating a visitor by general words, she has directed by the statutes, that the *Chancellor* once in every year should visit the college.

De lectione statutorum.

"Item volumus, quod dictus Cancellarius magistrum & omnes socios & singulos Domus prædictæ annis singulis, si opus fuerit, poterit visitare & *si quid inter eos repererit corrigendum* illud cum assensu, &c. corrigat & puniat.

If nothing more had been done than is mentioned in this statute, that alone in my opinion would have been sufficient to make him a visitor, for there are no particular words required to create a visitor; but it has been determined it is sufficient, if the intention of the founder appears who should be visitor, and technical words are not necessary.

Si quid corrigendum, &c. makes him a general visitor, and if he finds a person taking part of the revenues improperly, he may under the power given him by this clause remove such person in favour of him who had the right.

In the next place, she directs who shall construe the statutes, and determine any doubt, that it shall be *the Chancellor* with his assistants, and by express words the foundress excludes her own heirs.

Nothing can be stronger than excluding the heirs, to shew she meant to give the Chancellor a general visitatorial power; and therefore I am clearly of opinion *the Chancellor* is visitor of this college.

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No court of law or equity can anticipate the judgment of a visitor, or take away their jurisdiction, for their determinations are final and conclusive.

If the Chancellor of this University then is visitor, the general powers of a visitor are well known; no court of law or equity can anticipate their judgment, or take away their jurisdiction, but their determinations are final and conclusive.

The visitatorial determination is *forum domesticum* and adjudged in a summary way *secundum arbitrium boni viri*, and therefore more convenient.

And it is a more convenient method of determination of controversies of this nature, it is at home, *forum domesticum*, and final

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final in the first instance, and they should be adjudged in a short way *secundum arbitrium boni viri*: it is true this power may be abused, but if it is exercised in a discreet manner, it is a much less expence than suits at law, or in equity; and in general, I believe, such appeals have been equitably determined.

The second question is, supposing there be a visitor, whether this visitatorial power extends to the charity founded by Mr. *Freeman?*

I am of opinion it does.

He directs two thousand pounds to be laid out in lands, the rents and profits of which are to be employed towards the maintenance of ten poor scholars in *Clare-hall*, *viz.* to two poor fellows, *there to be placed*, 25 *l.* apiece, &c.

What is *Clare-hall?* a corporation consisting of masters and fellows; and the power given by the charter was to incorporate by this name, not mentioning any number of fellows, but indefinitely.

It has been objected, here is nothing which imports they should be incorporated with the old fellowships.

But I am of opinion it is his intention, that there should be two fellows to be incorporated in that college, from the words, *there to be placed.*

To be sure, the rules laid down by the founder as to the fitness of the person, &c. ought to be observed.

The question then is, what is the consequence of this ingraftment?

It has been said, these fellows are not liable to the same rules, nor to be governed by the same visitor, with lady *Clare*'s foundation.

As there are such a number of ingrafted charities in colleges, it becomes a very considerable question.

It was objected the statutes can only extend over the corporation of *Edward* the Third, and that the corporation cannot extend itself, and that Mr. *Freeman* has not by his donation made his fellows members of this corporation.

[675] If *Edward* the Third had made it to consist of twelve fellows, a certain number then being limited, these new fellows could not have come in without a new incorporation; but where the number is indefinite, I see no rule of law to prevent the master and fellows of *Clare-hall* from incorporating these fellows.

Where there is an indefinite number, a lay corporation may incorporate new members.

A lay corporation, where the number is indefinite, may incorporate new members if they do not make an ill use of such a power.

If they may be ingrafted into this college, they are then members, and must be governed by the statutes of the college, and the rules of its discipline; and if so, then they are subject too to the visitatorial power of the visitor of the college; and if they are liable to it with regard to amotion, they are equally liable with regard to their coming in and election.

But it was said, the visitor will not have a right to determine as to the agreement or contract made between the masters and fellows, and Mr. *Freeman*'s executors.

But

But the masters and fellows agreeing to let in two new fellows, is such an act that the visitor has a right to examine into, and implicitly gave him a power over them; and he might have inquired into it within the year, as it was a transaction in that college, the whole of which is subject to his jurisdiction.

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A visitor is a much more proper judge of the comparative fitness and qualification of candidates than a court of law or equity, as they are more conversant in matters of that kind.

A visitor a properer judge of the comparative fitness of a candidate than courts of law or equity.

But I am further of opinion, that the plaintiff has excluded himself by his information from entering into this question, by expressly praying to be admitted a fellow of this college; and I must take it that every fellow of the college is a part of the college, for here is no averment that these new fellows are not a part of the corporation, or that they may not be masters of this college, or enjoy any other office under the original foundation.

But though I allow the plea, the parties may descend to proof and if the relator should be able to shew they are merely nominal fellows, and allowed to live in *Clare-hall* only for the sake of information and instruction, that would be of a different consideration.

The prayer too of the information is, "That the defendant "*Talbot* may come to an account with and make full satisfac- "tion to the relator for all and every the profits, emoluments "and advantages which have been made by him from the fel- "lowship during his possession," induces me to hold strongly against it.

Suppose the masters and fellows should have erred in the construction of the statutes, they may have innocently erred, and in such a poor provision as this is, it would be a great absurdity to make a fellow account for commons, &c. which he may have eat upon an imagination he had a right to them. [676]

But further, I do not approve of his turning this into an information, as the charity is already sufficiently established, (the want of which is the principal reason for coming into this court) when he might have had a *mandamus* to determine the particular right between the parties in a court of common law that has the proper jurisdiction.

An information here is improper; the application should have been to a court of law for a *mandamus* to determine the particular right between the parties.

Though it is said, *boni judicis est jurisdictionem ampliare*, I am extremely disinclined to encourage such suits, which may take off these learned bodies from their studies, and ingross their time very improperly.

But still this allowance of the plea will not preclude the relator to shew from other statutes, that these new fellowships are not liable to the general visitatorial power, under the original foundation of this college.

But as I must at present take the defendant's allegations to be true, the plea must be allowed (1).

(1) The general rule in these cases seems to have been laid down by Lord *Hardwicke* in *Green v. Rutherforth*, 1 *Vef.* 473. where he observes, that if a subsequent donor gives the *legal* estate, or a *trust* for a college without a declaration of

of a *special* trust, it will fall under the power of the *general visitor* to judge of the legal property in the one case, and the equitable in the other; because by giving in trust for the college generally, and neither creating a distinct visitor, nor a special trust, the donor has by plain implication intended, it should fall under the general statutes and rules of the college, and be regulated with the rest of their property: but where a distinct visitor is appointed, or a particular trust created, the intent of the donor or testator must be observed. *Vide Attorney General* v. *Governors of Harrow School*, 2 *Vef.* 552. *Master and Senior Fellows of St. John's College* v. *Todington*, 1 *Burr.* 158. *The King* v. *The Master and Fellows of St. Catherine's Hall*, 4 *Term Rep.* 233.

Case 257. *Coomes* versus *Elling and his Wife, March* 2, 1747.

A freeman of *London* ten years before his death purchased a leasehold estate for the term of forty years, in the joint names of himself and his wife: this is a fraud on the custom, and the leasehold estate was directed to be sold and applied in the like manner with the rest of the freeman's estate.

THE plaintiff, son of *Joshua Coomes*, an antient freeman of *London*, brought his bill for an account and satisfaction of the plaintiff's share of his father's personal estate, partly in his own right and partly in his sister *Mary*'s, as orphans of the city of *London*.

Mary died an infant and unmarried, and the plaintiff claims her share as her representative.

Joshua Coomes, ten years before his death, *purchased of the vicar of St. Martin's a leasehold estate for the term of forty years, in the joint names of himself and his wife*, and being also possessed of other personal estate, made his will, and thereby gives the plaintiff his orphanage part, and likewise to his daughter *Mary* a sixth of his customary estate, and directs it to remain in her mother's hands (now the wife of defendant *Elling*) till her age of twenty-one or marriage, and then devises all the rest and residue of his estate to his wife, desiring her to take the trouble *and expence* of maintaining, educating and providing for his daughter *Mary*, till such time as she attain the age of twenty-one or marriage, and appoints his wife executrix.

[677] Mr. Attorney General counsel for the plaintiff.

The defendants seem to make a question by their answer, whether the orphanage part of the plaintiff's sister, she dying intestate, unmarried and under 21, survives to the plaintiff her brother, or is to be divided between him and her mother.

But as this has been settled by many resolutions, and particularly in the case of *Harvey* versus *Desbouverie*, the 8th of *August*, 1735, (*Cas. in Lord Talbot's time* 130,) that the orphanage part and portion of an orphan of *London*, dying in his or her minority under 21, (if such orphan daughter so deceasing be unmarried at the time of his or her decease) *by this custom of the city* ought to come among his or her brothers or sisters by the father, surviving, as well advanced as not advanced in the life of the father, though the father of such orphan by his last will should otherwise dispose of the same, or die without a will, is so clear, he would not trouble the court with arguing it.

He also insisted for the plaintiff, notwithstanding there was a stated account between him and his mother in 1739, yet in regard he is intitled to his sister's orphanage share, (and who being an infant had never in her life-time settled any account)

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he is not bound by the account allowed and signed by him, so far as it relates to the sister, because, claiming under her right, he has the same liberty to open the account, as she would have had if she had been living, for there is no ground to say it is a stated account as to her, and if on opening it with regard to the sister, it should come out there is more due to her on account of her share of her father's estate, that will shew there was an error in that account throughout, and then the plaintiff is intitled to be relieved notwithstanding his release.

He insisted, in the third place, that the latter clause in the will, desiring the mother to take the trouble and expence of maintaining, educating and providing for his daughter till, &c. shewed the testator's intention that she should maintain her out of her own pocket, especially as it immediately follows the devise to the mother of the whole testamentary part, it is implicitly intended that she was thereout to maintain her, and therefore the mother is not intitled to any allowance for *Mary*'s maintenance, cloaths, board and education.

He insisted in the last place, that the leasehold estate in St. *Martin's Lane*, ought to be deemed a part of the testator's estate, and does not go to his wife by survivorship, and that it is equally a fraud upon the custom as if he had taken it to himself for life, remainder to the wife for life; for, as it is a joint-tenancy, she is as much intitled to the whole by survivorship, as if it had been limited to her in remainder only.

Mr. *Noel* and Mr. *Clarke*, for the defendants, insisted, this is a new point, and that there is no instance of a case of this kind before upon the custom of *London*; that this was a purchase made by the testator when in health, and ten years before his death, and that his widow being made a joint purchaser with him, it was an interest absolutely vested in her, and such an interest that he could not have disposed of unless he had survived her, and therefore she does not claim it as a gift now from her husband, but by operation of law, the *jus accrescendi*. [678]

LORD CHANCELLOR,

I am of opinion, the account settled between the plaintiff, who was thirty years of age at that time, and the defendant his mother, ought to stand and not be unravelled; but said he would give liberty for any of the parties to surcharge and falsify, and directed accordingly.

As to the point of maintenance, I think it was not the intention of the testator it should come out of the pocket of the mother (1).

To remain in her hands till the daughter's age of twenty-one or marriage, meant, as the mother is left executrix, that she should not pay it till then.

And if his intention was, that she should keep the daughter's customary part and not pay it till the contingency happened, then he could not have it in his view that she should pay interest for it in the mean time.

(1) *Vide Butler* v. *Butler*, *ante* 60.

 This

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This clause, *at her expence*, &c. is said to be a qualification of the legacy to herself, and that he intended therefore the mother should maintain her.

Persons cannot speak the whole at once; the testator certainly meant maintenance in the first instance should come out of the daughter's orphanage part, and if that was not sufficient, then I apprehend he did intend the rest of her maintenance should have come out of the residue of the legatory part. His Lordship therefore directed the expence of the sister's maintenance, from the time of her father's death to her own, to be paid out of the produce only of her capital of the orphanage part, for the capital itself he said could not be broke into.

The orphanage share, and not the legatory part, shall pay the charge of a child's funeral.

His Lordship asked Mr. Recorder *Stracey*, how the custom of *London* is with regard to the funeral expences of a child of a freeman who dies after the father, whether they ought to be paid out of the legatory part of the testator's estate, or the child's orphanage share.

[679]

Mr. Recorder said he did not know that it had ever been settled by the custom of *London* out of which fund it should be paid.

Lord Chancellor said, I think it very just, and reasonable, the child's orphanage share should pay it; and directed accordingly the mother should be allowed what she had expended in her daughter's funeral out of her capital.

With regard to the leasehold estate bought by the testator of the vicar of St. *Martin*'s.

I am of opinion, there cannot be a clearer case of a fraud on the custom.

If a freeman disposes of his property in such a manner as not to take place till after his death, it is a fraud on the custom.

There are several cases of fraud on the custom of *London*, tho' not in specie with the present case (1): it has been held, if a freeman disposes of his property in such manner as not to take place till after his death, it is a fraud on the custom.

Here the freeman, possessed of a personal estate, lays out some of it in a purchase of a leasehold estate for the joint lives of himself and his wife.

The consequence is, the husband might have disposed of the whole.

It has been said, if the wife survives him, the moment he dies, this is to be taken out of his personal estate; for that it does not come to her by the gift of the husband, but by operation of law, the *jus accrescendi*.

A wife cannot, during the coverture, acquire any property distinct from the husband.

And yet it must be allowed, that in his life-time he had equal power to dispose of it as any other part of his personal estate; for the wife cannot during the coverture acquire any property distinct from the husband.

Suppose *Joshua Coomes* had taken the leasehold estate for himself and one of his children, it had been a gift as to a moiety only; and as to the other moiety, it would be an advancement to the child, and must be brought into hotchpot.

(1) *Vide Smith* v. *Fellows*, *ante* 2 vol. 377.

Suppose

Suppose he had taken it intirely in the name of his wife, then it would have been the estate of the husband, and he might have disposed of it in his life-time equally as now.

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Indeed if the gift to the wife had been made by the husband to trustees, for the separate use of the wife in possession, this *might have been of a different consideration, and I should be inclined to think such gift was good (1), but I will not give an absolute opinion.

If it had been conveyed to trustees for the separate use of the wife in possession inclined to think such a g. it would have been good.

[*680]

Upon the whole, I think the leasehold estate so purchased, must be considered as part of *John Coomes*'s personal estate.

Lord Hardwicke directed it to be sold before the Master, and the money arising from the sale thereof to be applied in like manner with the rest of the testator's personal estate.

He directed the widow's third part of the customary estate, and also the residue of the testamentary part, after debts and legacies, to be retained by the defendant *Elling* and his wife.

And as to the remainder of the orphanage part, he declared the plaintiff to be intitled to one third in his own right, and the other third in right of his sister, and directed it to be paid to him accordingly (2).

(1) [illegible] v. *Jones*, ant. 2 vol. 600. (2) *Reg. Lib.* A. 1747. fol. 512.

C[illegible] versus *B[illegible]*, *M[illegible]* 4, 1747. Case 258.

UPON a marriage between *Richard Branthwayt* and *Mary [illegible]*, by articles previous thereto, dated the 15th of [illegible], in consideration of one thousand pounds portion, *Richard Branthwayt* covenanted with trustees before *Michaelmas* next ensuing, to lay out two thousand pounds upon the

R. B. by articles previous to his marriage, covenanted to lay out 2000*l.* in the purchase of lands, and to settle the same

on himself for life, and after his decease, to *Mary* his intended wife for life, and after both their deceases to trustees [illegible], and the money arising from such sale, to be divided among the children of the marriage, [illegible] at 21, daughters at 21, or marriage, *provided no sale be made till one of the portions shall be payable.* The purchase was made accordingly, [illegible] *Elizabeth* the only surviving child died unmarried, but had attained the age of 21, the absolute proprietor of these estates, *Elizabeth* having [illegible] them all [illegible] her life time, and done [illegible] to shew she intended they should be considered as real estate, they must be held as such and go to the heir (1).

(1) Where a person is absolutely entitled to have lands agreed to be purchased, or money to arise from the sale of lands, he may elect to have either the one or the other. As to what shall amount to an election in those cases, see *Chichester* v. *Bickerstaff*, 2 *Vern.* 295. *[illegible]* v. *S[illegible]*, 1 *P. W.* 172. *Edwards* v. *Countess of Warwick*, 2 *P. W.* 175. *Bo[illegible]* v. *[illegible]* *Shi[illegible]*, 5 *Bro. Par. Ca.* 269. *B[illegible]* v. *Gee*, *Amb.* 229. *H[illegible]* v. *Wright*, 1 *Bro. Cha. Rep.* 80. *Pulteney* v. *Earl of Darlington*, *ibid.* 224. So where money is directed to be laid out in the purchase of land to be settled on one [illegible], remainder over, in this case the tenant in tail, and remainder man [illegible] elect that it shall be taken as money [illegible] discharged of the [illegible] *Trafford* v. *Boehm*, *ante* 440. But if the tenant in tail be a *feme covert*, then it is necessary to apply to the court of chancery. *Oldham* v. *Hughes*, *ante* 2 vol. 453. *ante* 448. In what cases equity [illegible] money directed to be laid out in the purchase of lands, as land; *vide [illegible]* v. *Gaudet*, *ante* 254. note.

CRABTREE v. BRAMBLE. purchase of lands to that value, and to settle the same upon trust for *Richard Bramble* for life, and after his decease, to *Mary* for life, and after both their deceases, to the use of trustees and their heirs, upon trust, that the estate so to be purchased, after the deaths of *Richard* and *Mary*, be sold, and the monies arising by such sale divided among all the children of the marriage, share and share alike, to the sons at 21, and to the daughters at 21 or marriage, *provided no sale be made till one of the shares shall become payable*; and if all the children shall die before any portions shall become payable, then the estate shall not be sold, but after the decease of such children, the trustees and their heirs shall stand seised of the same, in trust for *Richard* and *Mary*, and the survivor, and the heirs, executors, administrators and assigns of such survivor for ever.

The marriage took effect and eleven hundred and fifty pounds was laid out soon after in the purchase of lands in the island of *Thorney* in *Sussex*, and settled to the uses in the articles.

[681] *Richard* by his will directs his executors to purchase lands of the full value he was obliged to purchase on his marriage, and settle the same on such persons, and for such uses as he ought to have done, it being his intent that the marriage-agreement should be performed.

Richard died the 14th of *August*, 1701, and a further purchase was made of a farm called *Raymonds* in *Sussex*, in trust for the uses in the marriage-articles; *Mary* the wife of *Richard*, on the death of her husband, entered upon both the estates, and enjoyed them till her death, which happened the 18th of *November*, 1742: *Elizabeth*, the only surviving daughter by *Richard*, died unmarried, and intestate, the 7th of *December*, 1744, and the plaintiff her sister, of the half blood, and next of kin, hath taken out administration, and thereby become intitled to the intestate's personal estate; and insists, that the trust estates by virtue of the marriage-articles ought to be considered in a court of equity, as personal estate of *Elizabeth*, she having attained 21 years in the life-time of her mother, and that the estates were never conveyed to *Elizabeth*, nor did she ever apply to the trustees for any conveyance, nor did she do any act whereby she considered the estate as real, and therefore the plaintiff has brought her bill, that the trust estates may be sold, and the money be paid to her, and likewise the rents in arrear since *Elizabeth*'s death.

The defendant *Richard Bramble* insists, that as the trust estates were not sold by the trustees, and turned into money in the life of *Elizabeth*, and as *Elizabeth* did receive the rents of the estates from the death of her mother to her own death, the same ought to be considered as real, and not as personal estate; and therefore, on the death of *Elizabeth*, insists, the estates descended to him as her heir, on the part of the father, the defendant's grandfather, being the only brother of *Richard*, the father of *Elizabeth*.

It was proved in the cause, that *Elizabeth*, in 1728, let *Raymonds* farm to one *Lindop*, upon lease for the term of 11

years,

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years, and that he agreed to pay the yearly rent of 50 *l.* to *Elizabeth*, her heirs and aſſigns, for this farm, and he did, from time to time, pay *Elizabeth* accordingly, as the ſame became due; and before the expiration of the firſt term, on the 8th of *December*, 1739, *Lindsp* took a further leaſe of the farm for 21 years, at the ſame rent, and with the uſual covenants both on the part of the leſſor and the leſſee, and paid *Elizabeth* the rent ſo long as ſhe lived.

Mr. *Sollicitor General* for the plaintiff.

[682] The queſtion is, Whether this is to be conſidered as land or money; if the latter, then it goes to the plaintiff, the ſiſter of the half blood to *Elizabeth Bramble*.

Independent of any election *Elizabeth* may have made, clearly it is money, and if land is directed by marriage articles to be turned into money, in this court it is to be conſidered as perſonal eſtate.

In the caſe of *Guidot* verſus *Guidot* (1), after *Trinity* term, 1745, a ſum of money, by articles previous to the marriage, was agreed to be laid out in the purchaſe of lands in *Great Britain*, or in ſome church, college, or other renewable leaſe, and to be ſettled to particular uſes, the laſt limitation to the huſband and his heirs.

The money was not inveſted in the purchaſe of any freehold, or leaſehold lands, but remained in money to the death of the huſband, *and as he had made no election*, Lord Chancellor held, that at the time of his death it ſtood in equity as it did in the articles, either to be laid out in freehold or leaſehold, and therefore the court will call it one or the other, according to the rule in equity, that what is agreed to be done muſt be conſidered as done, and declared that the money ought to be laid out in the purchaſe of lands of inheritance, or in church, *&c.*

In the preſent caſe, *Elizabeth made no election*, and therefore at her death it ſtood in equity as it did in the articles, and as it was there directed to be turned into perſonal eſtate, muſt be conſidered as ſuch.

He then cited the caſe of *Lingen* verſus *Sowray*, 1 *P. Wms.* 172. where, by articles before marriage, the huſband agreed to add 700 *l.* to the wife's portion of 700 *l.* and the ſecurities for this money were agreed to be inveſted in land, and the laſt remainder was to the huſband and his heirs, 250 *l.* of the money was called in by the huſband, and afterward placed out by him on a different truſt, and declared to be to him, his executors and adminiſtrators, this Lord *Harcourt* held to be an alteration of the nature of it, and that it ſhall be taken to be perſonal eſtate, ſince the huſband's declaring the truſt to his executors ſeems tantamount with his having declared that it ſhould not go to his heir.

Here, by the direction of the huſband *Richard Bramble*, after his and his wife's death, the truſtees are to turn it into money

(1) *Ante* 254 S. C.

CRABTREE *v.* BRAMBLE. money to be divided among the children of the marriage, and therefore what is agreed to be done, must be considered as done.

[683] The second question is, Whether *Elizabeth*, the only surviving child of the marriage, did any act to declare her election it should continue land.

It has been insisted by the defendant in the answer, that she has done it by letting *Raymonds* farm upon two different leases, one for 11, and the other for 21 years, and thereby reserved a rack-rent of 50 *l.* a year to herself, *her heirs and assigns.*

There is no colour to say she has made an election by this means, and very extraordinary she should make a lease whilst the mother was living, who does not appear to have joined; but supposing it to be a lease made after the mother's death, here is no fine taken, the value in no respect lessened, nor does the reservation to her heirs and assigns at all hinder the sale; for if she had sold it, the purchaser is her assignee, and takes as such, and therefore as she has done nothing one way or the other, and left it without any act to declare her election, it will not alter the nature of it, but continues money according to the authorities cited and must go to the plaintiff.

Mr. *Wilbraham* of the same side.

The husband who had an absolute power over the 2000 *l.* orders it to be invested in lands to the use of himself for life, and to the wife for life, and then directs, on the death of the survivor of husband and wife, that it should be (notwithstanding the estate in lands for their lives) turned into money to be divided among the children.

If the articles are to be carried into execution, according to the letter of them, then clearly the land ought to be sold, for wherever it is agreed to be sold, or directed to be sold, this court will look upon it as money.

The father and mother might apprehend it would be inconvenient to let children be tenants in common of land, and as here was a child of a former venter, it might be done with a view of giving her a chance of coming in for a share.

In *Doughty* versus *Bull*, 2 *P. Wms.* 321. "The plaintiff's "father devised lands to trustees in fee, in trust to apply the "profits, till sale, for the benefit of all his four children, and "the survivors and survivor of them equally; and on further "trust, that as soon as the trustees shall see necessary for "the benefit of the children, they should sell the premisses, "and apply the money for the benefit of the four chil- "dren equally, to be paid at 21, or marriage. *A.* the el- [684] "dest of the four children attained 21, and married, and "died without issue, intestate, leaving a wife: the court de- "creed, the lands being in all events devised to be sold, "though the time for sale was left to the executors, was per- "sonal estate, and *A.*'s widow must have a moiety of *A.*'s "share."

So

So that it was determined to be personal estate, because it was so declared by the person who had the original power.

The question is, Whether any thing has been done by *Elizabeth Bramble*, either in the life-time of the mother, or in her own, to shew her election that it should be real estate?

The granting the leases in the mother's life-time shews no more than she intended to make the best of the land; she enjoyed the lands for two years after her mother's death, and if she had intended to sell them, could not have done more for the advantage of selling them, than letting them out on a rack-rent, and therefore this fact is of no avail to shew her intention to make it real estate, and if so, then the articles ought to be specifically performed; and the court will not be averse that it should fall into the hands of the plaintiff, a sister of the half blood, rather than to the defendant, a remote relation, who happens to be heir at law.

Mr. *Attorney General* counsel for the defendant.

Elizabeth, in 1728, made a lease for 11 years, and in 1739, for 21 years, of this farm, and reserved a rent of 50*l* a year, payable to her, her heirs and assigns, a covenant on the part of tenant to pay it to her, her heirs and assigns, a proviso if the rent should be in arrear, that she might re-enter, and hold to her, her heirs and assigns, and covenants likewise, on the part of herself, her heirs and assigns, to perform the several intents and purposes of the lease.

The general question is, Whether this is, or is not, to be considered as personal estate?

There is no dispute but *Elizabeth* had the equitable absolute property, but says, the plaintiff, though she enjoyed it as a real estate, yet as there is nothing done to shew her intention or inclination, it should be considered as real estate, it ought to go according to the direction of the articles.

It is not natural to suppose the parties to the articles should mean to convert it into personal estate, where it was not at all necessary, or of any advantage to the child, it should be converted into money.

The most material question is, whether it does not appear on all the circumstances of the case, it was her intention to consider this as her real estate, and if so, the court will not alter that merely because the original trust was to turn it into money, and merely too to make it from the heir at law? [685]

Acts, as well as words, will declare the intention, her giving receipts for rents, as the rents of real estate, and as she has thought proper to receive it from a tenant of real estate, she does not consequently receive it as money, but considers it as her real estate.

The plaintiff claims it merely as her personal representative, and not under the articles.

It is objected, she has not applied to the trustees for possession of the lands.

But

CRABTREE v. BRAMBLE.

But what she has done is stronger, for she has in opposition to them taken the possession.

Mr. *Noel* of the same side.

This court does not consider absolutely money to be laid out in land, as land, or land to be turned into money, as money, unless it is consistent with the purposes for which the [illegible] is intended to be sold; or, on the other hand, for which the money is to be invested in land.

As to the articles themselves, [illegible], but for the ease of their children, the court [illegible] in view to turn it into money.

Provided [illegible]

Therefore, if that case did not [illegible] to turn the estate into money, [illegible] become due, then the [illegible] as personal estate.

In the case of *Chalmers* versus *Bul*[illegible], [illegible] *Rolls*, the dispute was between [illegible] personal estate, [illegible] to be laid out in land [illegible] and if no issue, the [illegible] the wife's death without issue. [illegible] the court held, [illegible] question concerned the right of [illegible] person, the declarations of the husband [illegible] but as it was between his personal [illegible] they should be read, and determined it upon the deed only.

[686] there is no pretence in the present case that [illegible] and then it should be turned [illegible], and in the case of [illegible], 171. Lord [illegible] in all cases where it [illegible] betwixt an executor and an heir, the [illegible] preference.

The enjoyment of [illegible], who had a power over it in that species, considering it as land, is an [illegible] evidence of her intention, that it should not be turned into money,

It would be [illegible] heir should be the object [illegible] to make good the purpose [illegible] not be the object [illegible] them, but should go to her person [illegible].

All the circumstances put together [illegible] to shew the party, who had a power, [illegible] should continue as land.

And though the defendant [illegible] been called [illegible] relation, he cannot be considered [illegible], when he is directly in the [illegible] line of [illegible] the party to the articles, as he is a grandson of his brother.

LORD CHANCELLOR,

This is a question between a personal representative and an heir at law, concerning a property which at present is existing as real estate.

It

It has been contended on the side of the plaintiff, that this which is now real estate, and standing in trustees' names, is to change its nature, and to be considered as personal estate. CRABTREE *v.* BRAMBLE.

The general question is, whether it is to be considered as land or money? and this will depend on two questions; *First*, Whether on the nature of the trust in the articles independant of any election by *Elizabeth*, it ought to be considered as land or money? *Secondly*, Whether *Elizabeth* has shewn any intention it should be kept as real estate?

To be sure, it cannot be said to be a clear case, but on the face of the articles one of the weakest in which a personal representative could come into this court, to turn it into money.

The trust under the articles is, "that the estate, so to be "purchased after the deaths of *Richard* and *Mary*, be sold, "and the monies arising by such sale divided among all the "children of the marriage, share and share alike, to the sons [687] "at twenty-one, and to the daughters at twenty-one or mar-"riage, *provided no sale be made till one of the shares become*

It is truly observed, that the contracting parties supposed there might be more children than one of this marriage, and consequently more convenient, if several, to take their portions as money, for the provision being small, it might be wanted to set them up in trade, &c.

Nothing is said of a sole child, but only that it should be divided among the children, and by turning it into money might be done with more ease; but to have directed a compulsory sale upon one child, would have been a pretty frivolous direction of a parent.

The proviso is not, till the money arising by sale should become payable, *but until one of the shares become payable*; which is still proceeding as if the whole was not to go to one.

And the very last clause is, if *all the children should die before any portions shall become payable*, "then the estate shall not be sold; "but after the decease *of such children* the trustees and their heirs "shall stand seised of the same in trust for *Richard* and *Mary*, "and the survivor, and the heirs, executors, administrators and "assigns of such survivor for ever."

So that taking the construction of the declaration of trust together, the contracting parties seem to have had in view the case of several children; but the observations I have made are not decisive, because they do not absolutely detetermine there should be no sale if one child, though they have weight so far that the case in which they directed a sale has not happened.

The second question is, as to the election of *Elizabeth* the daughter, whether there be any evidence in the case of her electing to keep this as land?

It must be allowed equity follows the contracts of parties, in order to preserve their intent, by carrying it into execution, and depends on this principle, that what has been agreed to be done for valuable consideration is considered as done, and holds in every case except in dower: and therefore where money is to be

CRABTREE v. BRAMBLE.

be laid out in land, there the court will make it have the property of land; the same rule of lands to be converted into money.

No election could determine the question as to those claiming under the trust, but as to those only who claim as volunteers.

[688] The father *Richard Bramble* died in 1701, the mother in 174[illegible], and being reduced to one child, must dep[illegible] her acts, she did not die till 1744, and therefore [illegible] judging, as she was turned of 40.

She on the mother's death entered on the land, and from that time continued in possession for two [illegible] made no application to trustees to [illegible] against them to sell, though she [illegible] sell, and, as *cestuy que trust*, might [illegible] and bound the trustees.

But there is still something more in [illegible] in 17[illegible]0, of the lands, reserving a [illegible] the heirs, and likewise in 1739, with the same reservation.

This hath been insisted to be a further act to shew she approved of its continuing as land.

It was objected, the leases were made in the life-time of the mother, who had her life in the [illegible] the [illegible] net, whether she had a right to [illegible] but [illegible] this does not amount to an approbation of its continuing as real estate.

Elizabeth, [illegible] was the only [illegible] of the [illegible] mage, had a right [illegible] even in her mother's life-time to come into this court, [illegible] trustees to sell [illegible] for her own use.

Had she any right to make an election at twenty-one after the death of the father, as she was the only child left [illegible] I am of opinion that she had a right to elect [illegible] during the mother's life, and that she [illegible] into this court to compel the trustees to sell [illegible] for her benefit, [illegible] the mother's life-time, [illegible] yet [illegible] instead of doing this, she makes leases of the land, reserving rent to her, *[illegible]*

Can there be a stronger evidence to shew her intention of continuing it as real estate, than that she had [illegible] good this lease?

It has been said, the trustees in point of law had a right to receive the rents, and to have [illegible], and yet there is against the possession, or agreements [illegible] of the lands, and it was a very material observation of the defendant's counsel with regard to the lease's being liable to [illegible] on the part of the lessee.

The case of *L[illegible]* versus *S[illegible]* (1) in one part of it is rather for the defendant, for " the article (said Lord *H[illegible]*) have in " equity changed the nature of the money, and turned it as if it " were into land; and therefore, as to so much of the 1[illegible]00*l.* " as is subsisting upon the securities on which it was originally " placed, or on any other securities *where no new trust has been* " *declared*, it ought to be considered as real estate."

The court [illegible] This court, [illegible] use the expression in a court of justice, [illegible] means to an heir at law.

(1) *[illegible]*

But

But what use does Lord *Harcourt* make of the words *Executors and Administrators* in that case? why, says he, "as to the "250*l.* of the 1400*l.* which was called in by the husband, and "afterwards placed out on securities on a different trust, that "shall be taken to be personal estate, for placing it out thus, "I take to be an alteration of the nature of it, since the "husband's declaring the trust *to his executors, and administrators* "seems tantamount with his having declared it that should not "go to his heir." CRABTREE *v.* BRAMBLE.

So here, for that goes in the present case, the husband there could not more otherwise than declare the trust to his executors and administrators, and yet the court held, that it should not go to his heir.

Here *Elizabeth* reserved to her, her heirs and assigns, and said by the plaintiff's counsel she could not do otherwise, and very true she could not, and yet, though she could not reserve otherwise, there is equal reason in the present case to hold it as her intent it should not go to her heirs, as in *Lingen* versus *Sowray*, to the executors, and this will be sufficient to determine the question as between the representative of the personal estate and the heir, for it was truly said by Lord *Macclesfield*, it has been the rule of the court to give the turn of the scale in favour of the heir.

Lord Macclesfield said it was the rule of the court to give the turn of the scale in favour of the heir.

And therefore, as I find it land, and the absolute proprietor took it as land, and there are no acts to shew she intended it should be converted as money, I shall consider it as such, and therefore the bill must be dismissed, but without costs.

[illegible] versus Gwyn and Wright and others, the Second Seal, Michaelmas Term 1748. Case 259.

THE bill was brought against the defendant *Gwyn* for a foreclosure, and against the defendant *Wright* for a discovery of his incumbrances on the mortgaged premisses, and for delivery of a moiety of the estate in possession of the defendant *Wright* to the plaintiff.

The court will not determine matters in a summary way upon motion that have been reserved between parties, till after the master has made his report.

Mr. *Wright* by his answer insisted on a prior incumbrance upon *Gwyn*'s estate, and claimed to be tenant by the curtesy of the whole estate, and that his son had the fee under an old settlement.

At the hearing of the cause, Lord Chancellor decreed that *Gwyn* should redeem or stand foreclosed, and that the consideration of the matters in question, between the plaintiff and the defendant *Wright* should be reserved till after the master made his report in relation to *Gwyn*. [690]

The Master reported the defendant *Gwyn* had not redeemed the plaintiff by the time limited, and that report was confirmed.

The plaintiff, instead of setting down the cause upon the equity reserved between him and the defendant *Wright*, applies now

Cooke v. Gwyn.

now by motion for the delivery of the possession of the moiety in mortgage in him.

LORD CHANCELLOR,

The court, where they have at the hearing of a cause reserved any of the matters in question between the parties, till after the master has made his report, will not determine those matters in a summary way upon motion, but the plaintiff should have set it down in the ordinary course upon the equity reserved.

A receiver may be granted on motion, notwithstanding the reservation of all matters under the decree, for this is a mere provisional order.

If the plaintiff had indeed moved for a receiver, and had laid a proper case before the court for that purpose, I would have granted the motion notwithstanding the reservation under the decree; because this would have been a mere provisional order, and would not have affected the question between the parties.

Case 260. *Anonymous.* *Michaelmas Term, Nov.* 10, 1748.

The defendant being a prisoner in *York* gaol, and the demand so trifling it would not bear the expence of removing him by *habeas corpus* to the *Fleet*, it was moved, to save this expence, that for want of appearance the bill might be taken *pro confesso*, the court refused to do it in this summary way.

MR. *Wilbraham* moved that a bill of revivor might be taken *pro confesso* against a defendant, a prisoner in *York* gaol for want of an appearance, without the expence of removing him by *habeas corpus* to the *Fleet* and bringing him into court, as the demand against him by the bill was so trifling that it would not bear the charge of the journey from *York*.

After the act for making process in courts of equity effectual against persons who abscond, there was a doubt whether it extended to bills of review, but it is now settled that it does, and therefore the plaintiff must have recourse to the ordinary remedy.

Lord Chancellor said, he could do nothing in this summary way, but the plaintiff must proceed in the usual method pointed out by the 5th of the present King, *c.* 25. the act "for making "process in courts of equity effectual against persons who ab"scond and cannot be served therewith, or who refuse to ap"pear;" and though for some time after making this act there was a doubt whether it extended to bills of revivor, where defendants refused to appear to such bill, yet it is settled now that it does; and therefore you must upon this occasion have recourse to the ordinary remedy (1), and his Lordship denied the motion.

(1) *Vide Henderson* v. *Meggs*, 2 *Bro. Cha. Rep.* 127.

Bishop versus *Church and others*, *Dec.* 8, 1748. Case 261.

S.C. 1 Vef. 100, 371.

B. a refiduary legatee, and furviving executrix of her hufband, to whom C. and O. had given a joint bond, C. died, and the plaintiff was indebted on her own private account to O. who is a bankrupt; the bill brought againft his affignees for an injunction, and to fet off what was become due to her as executrix againft the debt from herfelf to the bankrupt. Injunction denied: for as fuch a fet off could not be done at law, there is no inftance of its being allowed here; for the debts are due in different rights, and 2 Ca. 2. does not comprehend it.

A Motion was made for an injunction upon the following cafe: The plaintiff was the refiduary legatee, and furviving executrix of her hufband, to whom *Church* and one *Owen* had given a joint bond for payment of a fum of money: *Church* one of the obligors died, and the plaintiff was indebted upon her own private account to *Owen* who was become a bankrupt.

The plaintiff's bill therefore was brought againft his affignees for an injunction, and to fet off what was due to her as executrix, &c. againft the debt due from herfelf to the bankrupt.

Lord Chancellor denied the injunction; and as to the fet-off, faid, that it was admitted this could not be done at law, nor did he know of any like inftance here: the debts are due in different rights: [illegible] *fect.* 13. does not comprehend this cafe; nor is it within 5 *Geo.* 2. for preventing the committing of frauds by bankrupts, for here was no mutual credit between the parties, and this matter had been determined the fecond of *April ex parte Hope*.

If this court was to go into inquiries of this fort, an account muft be taken of the teftator's whole eftate, till it was feen if there was a furplus fo as thereout to make *a fet-off*.

Another confequence would arife; it is often doubtful whether executors can take a refidue, which might draw on infinite expence if it fhould be allowed of in the like inftances.

Anonymous. *Hilary Term*, *Jan.* 24, 1748. Case 262.

A defendant cannot revive but in one inftance, and that is after a decree to account, becaufe in that cafe he is confidered as an actor; for till the account is taken it is not known on which fide the balance lies.

ABOUT five years ago a bill was brought by feveral perfons claiming to be heirs at law to the Duke of *Buckingham*; the defendants likewife infifted on being heirs at law, and iffues were directed to try it: the plaintiffs were not found to be heirs at law, but the defendants only, who have fet down the caufe upon the equity referved.

The plaintiffs now move to adjourn the caufe till the reprefentatives of fome of the parties are brought before the court. [692]

Lord Chancellor faid, a defendant cannot revive but in one inftance, and that is after a decree to account, becaufe in that

cafe

Anonymous. case a defendant is considered as an actor (1) for until the account is taken it is not known on which side the balance lies; but even in a bill brought for an account, till the cause is heard, if there is an abatement, the defendants cannot revive; and therefore it is the plaintiffs only, who ought to see there are proper parties; and if they have in this case neglected to do it, and should be defective in this particular when the cause comes on again, I shall not let it stand over upon paying only the costs of the day, which is the usual method, but shall dismiss their bill out of court with costs to be taxed.

(1) *Vide Kent* v. *Kent*, *Prec. Cha* 197. *Stowel* v. *Cole*, 1 *Eq. Ab.* 3. *pl.* 5. *Dunc's* case, 1 P. W.[*] 263.

Case 263. *Stiles* versus *Cowper*, *March* 8, 1748.

Sir *J. C.* lets a building lease of sixty-one years, of a house in *Lincoln's Inn Fields* to *W.* who assigns over the lease to the plaintiff for the remainder of the term. He rebuilds the house, and lays out 5000 *l.* for that purpose, and pays the reserved rent of 40 *l.* to Sir *J. C.* till he died. On his death the defendant became intitled as first remainder man in tail: for six years he thought proper to receive rent, and then brings an ejectment, and recovers at law for want of the usual covenants in the building lease. The plaintiff brought his bill for an injunction, and to be quieted in possession. *A new lease directed to be executed with proper covenants, and the plaintiff to hold the premisses for the remainder of the time* (1).

IN 1700 Sir *John Cowper*, the father of the defendant, who was intitled to an undivided moiety of houses with Mr. *Henley* in *Portugal Row*, *Lincoln's Inn Fields*, and by a private act of parliament empowered to make partition, and to let out his moiety on a building lease for sixty-one years made a lease of part thereof for sixty-one years to Mr. *Ward*, reciting therein the power given to him in the act of parliament of leasing, and a liberty to the lessee to quit after the first twenty years on giving proper notice.

Mr. *Ward*, some time before 1716, assigns over the lease to *Hoskins Stiles* for the remainder of the term, who in the year 1716 rebuilds the house, and lays out above 5000 *l.* for this purpose, and constantly pays the rent reserved under the lease of 40 *l. per ann.* to Sir *John Cowper* till 1729, when the lessor died, who was only tenant for life; and on his death the defendant, his eldest son, became intitled to it as the first remainder-man in tail.

From the year 1729 to 1735 the defendant thought proper to receive the rent from Mr. *Stiles*, and during that time the tenant, at his own expence, built new offices.

It appeared to the court, upon reading the lease, that the covenants usual in building leases were not inserted here (2).

(1) *See Vide Doe, Lessee of Simpson* v. *Butcher*, *Douglas*, 50 2d. *Ed.*

(2) Nor was the lease made pursuant to the usual conditions required by leasing powers, and especially by the power contained in the act of parliament.

Can versus *Read*, *June* 1, 1749. *Trinity Term.* Case 266.

THE motion in this cause was for an injunction on an offer to pay the money into court, for which the defendant's action at law is brought (1).

A debtor to a bankrupt estate, paying the debt to one assignee, is not a discharge, he should have taken a receipt likewise from the co-assignee. Otherwise as to an executor, because they have each a power over the testator's whole estate, and considered as distinct persons.

Lord Chancellor, in giving his reasons for continuing the injunction, said, he never knew any determination that a debtor to a bankrupt's estate, paying the debt to one assignee, and taking his receipt would be a discharge; but if the assignee did not bring this sum to account, and was insolvent, he doubted whether the debtor to the bankrupt estate would not be liable to pay it over again; for though payment to one executor is good, because they have each a power over the whole estate of the testator, and considered as distinct persons, yet assignees of bankrupts are in the nature of trustees, and unless the debtor to bankrupt estate had taken a receipt from the co-assignee, it is not an absolute discharge.

(1) The plaintiffs stated, that they, as debtors to a bankrupt, had brought their bill of interpleader against the assignees of the bankrupt, and the other defendants, who were his creditors. Two of the assignees claimed the debt, as standing in the place of the bankrupt, the *other assignee* and the rest of the defendants alleged, that the bankrupt only acted as *factor* or *agent* for them, and therefore likewise insisted upon the debt. After the defendants had put in their answers, the latter brought their actions at law. The plaintiffs now made the above motion, which was granted. *Reg. Lib.* A. 1748. fol. 455.

Hearle versus *Greenbank*, and *Andrew and others*, *Assignees of the Estate and Effects of Winsmore, a Bankrupt*, versus *Greenbank*, *Hearle and others*, *May* 30, 1749. Case 267.

THE end of the original bill was, that *William Worth's* will, and the will or disposition made by *Mary Winsmore*, in virtue thereof, may be confirmed and established by the decree of this court, and that *Greenbank &c.* may be compelled to execute the trusts under *Mary's* will, and to account with the plaintiffs for the real and personal estate of *William Worth* and *Mary Winsmore* deceased, and that if the defendant *Mary Winsmore*, the daughter of the testatrix *Mary*, makes out her title to all or any part of her late mother's freehold, copyhold, or leasehold estates, that then she may either convey her right therein to the plaintiffs, or else, that so far as the value of the estate shall extend, the same shall be taken by her in or towards satisfaction

S. C. 1 Vez. 298. *Lord Hardwicke* said, there was no precedent either in a court of law or equity, where it has been held, a power over real estate executed by an infant is good, and declared as he could find none, he would make none, and that the disposition Mrs. *Winsmore* in this case has attempted to make, could not take place.

Hearle v. *Greenbank.*

of the eight thouſand pounds deviſed to her by the will of her mother, and that the plaintiffs may be decreed an equivalent for the eight thouſand pounds, to the value of the ſettled eſtates.

The end of the croſs bill was, that the defendant *Greenbank* may account with the plaintiffs for the perſonal eſtate of *Dorothy Price* and *William Worth*, and for the rents and profits of ſuch part of their freehold, copyhold and leaſehold eſtates, as ſhall appear to belong to the plaintiffs, and deliver the poſſeſſion of the ſaid freeholds, copyholds and leaſeholds to the plaintiffs, and that all other neceſſary parties may join in conveying and ſurrendering the ſame to the plaintiffs, or as they ſhall direct.

William Winſmore, who was a tradeſman in *Worceſter*, in *March* 1739 intermarried with *Mary Worth*, the only child and heir of Doctor *William Worth*, archdeacon of *Worceſter*, who was very rich, without the knowledge or conſent of her father, Mr. *Winſmore* being at that time upwards of forty years of age, and ſhe not quite ſixteen.

The marriage was kept ſecret for many months, and when it broke out, Doctor *Worth* was at firſt greatly enraged at it, but *Winſmore* pretending that if the Doctor would let him have fourteen hundred pounds, part of three thouſand pounds, his wife's portion, independent of her father, he would make a ſuitable ſettlement; Doctor *Worth* did accordingly pay the ſum to him, and, in appearance, was reconciled to him, but Doctor *Worth* diſcovering ſoon after a fraud intended on him by *Winſmore*, and no ſettlement made, ſhewed an utter averſion to him, and would never be reconciled to him afterwards.

Winſmore being in inſolvent circumſtances, a commiſſion of bankruptcy iſſued againſt him, the 3d of *March* 1740, and *Johnſon* and others were choſen aſſignees.

On the 2d of *June* 1741 his wife was brought to bed of a daughter, the defendant *Mary Winſmore*, and afterwards Mr. *Winſmore* proving an unkind huſband, ſhe withdrew from him in *December* 1741, under the influence and perſuaſion of her father, who on thoſe terms became reconciled to her.

In *Auguſt* 1742 Doctor *Worth* died, but before his death he made his will, dated the 5th of the ſame *Auguſt*, and thereby deviſed "all his freehold, copyhold, and real eſtates, whatſo-
" ever and wherefoever, and all his leaſehold eſtate to *Wood* and
" *Greenbank*, their heirs, executors, adminiſtrators and aſſigns,
" upon truſt, that they ſhould apply the rents, iſſues and profits
" thereof, *to and for the ſole and ſeparate uſe of his daughter* Mary,
" *wife of* William Winſmore, *during her life, and at her diſpoſal,*
" *and not to be ſubject to the debts, power or controul of her ſaid huſ-*
" *band, but that her receipt, notwithſtanding her coverture, ſhould*
" *be effectual for the ſame, and upon further truſt that they ſhould*
" *permit and ſuffer his ſaid daughter, by any deed or writing to be by*
" *her executed, in the preſence of three or more credible witneſſes*
" *(notwithſtanding her coverture) to give, deviſe and bequeath all*
" *his ſaid freehold, copyhold and leaſehold eſtates, to ſuch perſon and*
" *perſons as his ſaid daughter ſhould think fit, ſhe having a parti-*
" *cular regard to his poor relations in* Cornwall.

[697]

" All

"All the rest and residue of his goods, chattels, and personal "estate, after payment of his debts, legacies and funeral ex- "pences, he gave to *Wood* and *Greenbank*, in trust *for his* "*daughter, and for her separate use and disposal, and not subject to* "*the debts, power or controul of her husband*;" and of his will appointed *Wood* and *Greenbank executors*.

On the 24th of *December* 1742, Mrs. *Winsmore* died at *Ryegate*, in *Surry*, where she had, ever since her leaving her husband as aforesaid, lived separate, but before her death, she, in pursuance of the power given to her by her father's will, did on the 16th of *October* 1742, duly execute her power of appointment and disposition delegated to her by her father's will, over his whole real and personal estate, by a writing signed and sealed in the presence of three witnesses, and in the form of her last will and testament, "whereby she gave and bequeathed to her daugh- "ter *Mary Winsmore* one hundred pounds a year, until the age "of ten years, and after, the further sum of fifty pounds a year "till she attains the age of twenty-one; *the said sums to be ap-* "*plied by her executors for the education and maintenance of her said* "*daughter according to their discretion*." She also gave and devised "to her said daughter 8000 *l.* *to be paid her when she* "*shall attain the age of twenty-one years*; *but if her said daughter* "*should die before the said age, without issue living at her death,* "*then she bequeathed the said* 8000 *l.* *to her cousins*, Henry Worth, "Esquire, *and* Francis Hearle, Esquire, *to be equally divided be-* "*tween them*; and after giving several other legacies, charges all "her real and personal estate which she was intitled unto by "virtue of her father's will, with the payment thereof, and ap- "pointed *Greenbank*, &c. joint executors, guardians and trustees "to her daughter till twenty-one; *and all the rest, residue and* "*remainder of her real and personal estate, which she was intitled* "*unto, or interested in, she gave and devised to the plaintiffs, their* "*heirs, executors and administrators, for ever, as tenants in com-* "*mon, and not as joint-tenants*." [698]

William Winsmore's certificate was allowed in *September* 1742, and the assignment of the wife's estate from the commissioners to the assignees was in *June* 1744.

Mr. Attorney General for the plaintiffs, made this question, whether Mrs. *Winsmore*, under the sanction and authority given her by her father's will, could dispose of the real estate, as she has done by her will, notwithstanding her infancy.

No intention of Doctor *Worth*'s appears to postpone the time for his daughter's disposing of his real estate any more than his personal.

She recites the power, but it is objected, that being an infant, she is incapable of making any alienation of her real estate.

It is admitted on the other side, that as a feme covert, she might dispose of real estate, though not properly by a will, yet by an instrument in the nature of a will.

A person may clearly by a power enable one to do an act who is in herself incapable of doing it: If a feme covert makes a lease, it is absolutely void, but if an infant makes a lease, it is

 not

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not absolutely void, for he may confirm it when of age; an infant, likewise may present to a church, so that they may do several things where they may be enabled by authority, though they cannot do it merely of themselves.

For this purpose *Cro. Jac. fol.* 80. was cited, and *Co. Lit. fol.* 45. *b.* an infant seised of land holden in socage, may by custom make a lease at the age of fifteen years, and shall bind him, which lease was voidable at common law. The year book of the 37 *H.* 6. *fol.* 5. *Placito* 9. is to the same effect; and in *Cro. Eliz.* 652. it is laid down that an infant may do by custom, what he could not otherwise by law, *Noy's Rep. fol.* 41. that a grant of a copyhold by an infant is good. What is it gives him a capacity? The law considers the custom of the place as enabling him to do an act, which he could not otherwise have done.

To apply these cases, the whole estate here is given to trustees, to permit her to receive rents during life; can it be denied, that she could have applied the rents as she thought fit? Now this she could not have done by law, and yet she certainly might by this delegated power.

[699] There is no case where there has been a determination in point, and therefore must be governed by the reason of the thing.

Lord Chancellor stopped the plaintiff's counsel, and mentioned the following one in [illegible] 512. *where it is said by Sir* Francis Moore *arguendo, that where the custom allows an infant to make a feoffment at* 15 *years of age, if he makes a feoffment to the uses which he shall appoint by his will, and makes a will, that which is read as being his last will,* [illegible] *an infant, yet shall serve to declare the uses of the* [illegible].

The counsel for the plaintiff [illegible] this was no authority, [illegible], and as the objects [illegible] under the will of Mrs. *H*[illegible] [illegible] the appointment, [illegible] would [illegible] overturn the [illegible] *Worth*, and therefore [illegible] the court will think she had a proper power to dispose of the real estate.

The next question is, whether the daughter of Mrs. *W*[illegible] must not accept of the eight thousand pounds that is given her under her mother's will, according to the terms of the will, or if she claims contrary to it, renounce the will *in toto*.

Nothing is a more known rule in this court, than where a person will take benefit by a will, he is not to contradict or contravene the will, where it is not for his advantage, and therefore she must take according to the intention of the testatrix, and cannot claim the estates devised away from her.

The next question is, whether the surplus interest shall accumulate till the daughter of Mrs. *W*[illegible] is of age, or sink into the residue for the benefit of the residuary legatee.

The appointing a particular maintenance of different sums at different periods, shews clearly her intention the surplus interest should not accumulate.

As

As to the ſum of fourteen hundred pounds, whether this is not in part payment by Doctor *Worth* of Mrs. *Winſmore*'s legacy from a collateral relation Mrs. *Price*, or whether it is a bounty from the father. HEARLE v. GREENBANK.

I apprehend it to be ſo clearly in part payment of Mrs. *Price*'s legacy, that the other is too forced a conſtruction to have any weight.

As to Mr. *Winſmore*, the huſband's being tenant by the curteſy, though this court has conſtrued a huſband to be tenant by the curteſy of a truſt, yet that does not extend ſo far as to make him tenant by the curteſy, where it is a truſt created by a teſtator clearly with an intention to exclude the huſband, in ſupport of this he cited *Sandys* verſus *Drewell*, before Lord *Hardwicke*, *December* 8, 1738. (2 *Atk.* 607.) [700]

Mr. *Evans* of the ſame ſide argued, That an infant may appoint a guardian by deed, and by the law has a power of alienating property: and in the caſe of *Arlington* verſus Sir *Walter Cavaley* in 1730, the infant then but one year old, conveyed by deed under hand and ſeal, and held to be good.

The cuſtom of gavelkind empowers an infant to diſpoſe of real eſtate at the age of fifteen.

Mr. *Hussey* of the ſame ſide argued, that Mrs. *Winſmore* took no more than an eſtate for life, with a power or diſpoſition to diſpoſe of the fee.

He cited 3 *Leon.* 51 to ſupport this diſtinction, that where an eſtate is firſt given for life, a power to diſpoſe as the deviſee for life ſhall think fit, does not make the eſtate for life merge, but is ſtill ſubſiſting, and the latter is conſidered only as a power, and not an expreſs deviſe in fee. *Vide Tomlinſon* verſus *Dighton*, 1 *P. Wms.* 149.

An infant or feme covert may deliver ſeiſin, becauſe one cannot prejudice himſelf, nor the other her huſband: for the ſame reaſon he may preſent to an advowſon, becauſe he does not prejudice himſelf, as he is not intitled to the profits; for the ſame reaſon he may grant copyholds, and this principle ſeems to be the teſt on which all theſe caſes are tried.

Mr. *Noel* to this point ſaid, an infant may be vouched in a common recovery, and alſo bound by aid prayer.

Mr. *Wilbraham* for the aſſignees under the commiſſion of bankruptcy againſt *Winſmore*.

That there is ſuch an intereſt in Mrs. *Winſmore* under *Doctor Worth's will*, as muſt make her huſband tenant by the curteſy.

He admitted that Doctor *Worth* intended to veſt his eſtate in truſtees for the ſole and ſeparate uſe of his daughter; that the direction is to pay to her the rents and profits of his real eſtate during her life, and that they ſhall by any deed, *&c.* ſuffer his daughter to diſpoſe of all his freehold, *&c.*

But then he inſiſted, that truſts are to be governed as near as may be by the ſame rules as uſes were at common law; and ſo much as is not diſpoſed of reſults back to the grantor, and that the truſt is a deſcendible intereſt, and will paſs in the ſame manner as in the caſe of a legal eſtate. [701]

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He alfo infifted, when this equitable intereft was given to receive the rents and profits for her life, the whole refidue of the intereft in the fee devolved upon her; for if the remaining part of the equitable intereft was not in abeyance, then it was *in Doctor Worth*, and confequently defcended upon his heir.

The teftator directs, that the very act of devifing and giving fhould be the act of the daughter, and therefore is not a mere execution of a power, but the very gift of the daughter herfelf, and fhe is the complete owner of the fee-fimple of the truft.

A power is given to this lady to difpofe of it in her life-time, and not barely to take effect after her death; if fo, then fhe had fuch a power as gave her the total intereft, and might have defcended to her daughter; for there was no other way of the daughter's taking it, becaufe the mother took it by defcent from her father, and the daughter, as deriving from the mother.

The next queftion is, Whether Mrs. *Winfmore* took fuch an intereft as fhe could difpofe of in her fituation, *infancy*?

It is admitted to be the law in gavelkind, that an infant of 15 may make a feoffment of land, but then it muft be very particular, for it muft be for money, and a confideration of *five fhillings* would not be fufficient.

In the cafe of copyholds mentioned, that is in the cafe of an infant Lord, and is merely for the intereft and advantage of the copyholder, and the infant is only *inftrumental*, and it is always *cui Dominus concefsit*.

In general, I do not know any inftance where infants have been allowed to execute thefe fort of powers, which will affect the intereft; and the prefent is a power coupled with an intereft, and requires as much ftability of mind to execute as a feoffment.

The reafon why the law of moft countries fixes it to a certain period of age when a perfon fhall have power to difpofe, is, that it would otherwife be liable to perpetual controverfy in particular cafes, whether the perfon has capacity or difcretion to difpofe or not.

[702] It is faid, whenever a power is executed it becomes a part of the original deed or will under which the power is given.

This feems to be abfurd, becaufe they cannot circumfcribe it by any rule but real difcretion, and it would be more convenient to adhere to the general rule of law, that infants cannot difpofe of real eftate till 21, or they may as well fay that fuch a power given to a lunatick is good, for fuch a perfon may as well be capable of difpofing as an infant in arms

Mr. *Capper* for the creditors of Mr. *Winfmore* infifted, that the obtaining his certificate will not make any alteration fo as to make it a new acquifition, and go to him, but will belong to his creditors; for this vefted by the commiffioners' firft affignment, and a fecond affignment upon any property falling into poffeffion, is rather *ex abundanti cautelâ*, and not abfolutely neceffary: and for this purpofe cited 1 *P. Wms.* 382.

Mr.

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Mr. Solicitor General, counsel for the daughter of Mrs. *Winsmore*, said, in the case of *Jewson* versus *Moulson*, before Lord *Hardwicke*, *October* 27, 1742, (2 *Tr. Atk.* 417.) it is laid down that creditors of a bankrupt must take in the same manner as the bankrupt himself would do, in case the wife was living; but though he is dead here, yet the child of the marriage has the same right with the mother, and has an equity to be provided for as well as the wife of the bankrupt.

The husband made no settlement on the wife and the children of the marriage, and besides received 1400 *l.* of the wife's fortune, so that he had within 100 *l.* a moiety of the wife's fortune under Mrs. *Price*'s will, which is more than what he ought to have, and therefore the infant daughter is intitled to the remainder of this legacy as a provision.

As to the point of the surplus interest of the 8000 *l.* there is a circumstance in this legacy which shews it vested before the time of payment, because if she dies before 21, leaving issue, it vested in her, and goes to her representatives, and therefore it is the intention of the testatrix it should vest in her for the benefit of the infant's family, and not with any view to the residuary legatee, and is postponed only on account of her tender years, being little more than a year old.

The last question and the principal one is, Whether Mrs. *Winsmore*'s is a good devise of the real estate.

I will consider the opinion of law first with regard to the infant's discretion.

The law of *England* draws the line at the age of twenty-one, [703] and therefore all courts must look upon a child of 19 as a child of 5 years old; and you are by the law concluded from saying she is more capable at one period of her age than another; and this is not only for the sake of herself, but for the sake of her heirs.

There are exceptions indeed to this general rule, but it is where infants are mere conduit pipes or instruments that do not fall within the reason of the law; for he has no discretion there to exercise, as in a presentation to a church, because the ordinary will take care that he is *persona idonea* who is presented, and therefore *a sucking child*, in the lap of the mother, may present.

An infant as an executor may apply assets properly, but cannot there do an act which would make him guilty *of a devastavit*.

Powers in the law language are divided into powers appendant and powers collateral.

As to powers that are naked authorities; he that is in by virtue of the power is in by the grantor of the power, and was so considered a good while; but then in the modification of estates they hold in courts of law, where they are coupled with an interest, they might be released or extinguished, and where they flow from an interest, they were considered as modes of ownership; and with this view courts of law construe them liberally as part of the old ownership belonging to the grantor of the estate.

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The law has said, that an infant may execute a naked authority, but I doubt whether a private person could give such a power to an infant coupled with an interest, because this is reversing the law; for the infant is seised in fee, and she will affect the inheritance at a time when the law says she is incapable of doing it, and is introducing a new sort of invention, in contradiction to the law.

And therefore it is an exceeding doubtful thing, whether a private person could give such a power.

May 31, 1749. *Hearle* and *Greenbank et e contra.* The Solicitor General went on for the defendant *Mary Winsmore* the infant.

Inability of infancy is a natural inability: before the statute of uses, all these powers were merely uses; an infant could not by bargain and sale convey the use of the land because equity follows the law, and he was equally unable to convey the use.

[704] The only thing that looks like an authority is what fell from your Lordship; one part of Sir *Francis Moore*'s argument led him to assert this proposition, that it should stand good as a declaration of the uses of a feoffment, though it is void as a will; but the matter there was intirely compounded, so that it does not appear of what opinion the court was.

In the late case of *Oake* versus *Heathe* (1) before your Lordship, you was pleased to say, that where a power was executed by way of will, and the appointee died before the testatrix, it lapses as much as if it had been a devise to a person of personal estate or real, and legatee dies in the life-time of the testator, and if the power is to be executed by a will, that will is subject to all the formality and ceremony as in any other common case of a will.

The statute of wills gave a power to devise to every person whatever; and though it does not say he shall not devise, yet the law operates upon it, and will not suffer an infant to do it who is under a legal inability to devise.

Wherever a man makes a settlement, and a limitation to his first and and every other son for life with a power, as each shall come into possession, to make leases and a jointure, there is not an instance to be shewn where it has been held that an infant, on whom this power devolves, could make a lease or a jointure; and there have been numberless acts of parliament to enable an infant to make a jointure, and others to enable them to make leases, which implies it canno. be done without.

Lord Chancellor said, there were instances of guardians being appointed, in case the limitation should take place in an infant, to make leases for him.

Mr. Solicitor General: This is strong for my client, because it shews the opinion of mankind that infants could not do those acts, and therefore appoint a guardian who must himself too be of age.

(1) 1 *Ves.* 135. S. C.

He

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He insisted, there can be no rational construction put on this will, to shew the testatator had any idea of his daughter's disposing of real estate before her age of 21.

At the time of his will Mrs. *Winsmore* was a young woman of 19, who had gone through the peril of child-birth, in good health, and not at all likely to die in two years time, so that he had no other view but to make her a *feme sole*, because the bankruptcy of the husband happening in 1740, he was guarding against his fortune's falling into the husband's hands.

Sole and separate use of my daughter, is always in contradiction to the husband. [705]

He was not contented with saying it affirmatively, he goes on and says it negatively, her receipt shall be good and valid notwithstanding her coverture; this is what he is providing for.

The next thing, as the marriage here, might continue during her life, is, to give her power to dispose notwithstanding her coverture; so that this is the only impediment the father is endeavouring to remove.

There is not a word in Doctor *Worth*'s will that says, she shall do it notwithstanding her infancy, or notwithstanding any other cause, objection or impediment.

To shew it in a strong light, let me suppose she had lost her senses, and had granted, being a lunatick, by deed or will; would this have been an execution of the power? and yet a lunatick in the eye of the law is not more incapable of doing an act than an infant.

The next question is, whether the infant can claim the lands contrary to the will, and yet be intitled to her legacy of eight thousand pounds likewise?

The rule, as laid down by the other side, is, you cannot take by the will in one respect, and reject it in another.

But the question here is, how it will be if the testatrix has taken upon her to devise lands to which she had no right, and whether, in such a case, if the devisee insists upon a personal legacy under the will, she cannot set up a claim to the lands contrary to the will?

The will here cannot be read in evidence to a jury, because the testatrix executed it under age, and consequently had no power to devise; therefore if we are right in our first position it is no will, it is absolutely void, and according to the case in *Siderfin* cannot be read.

The rule is, you shall make good the whole will, if you elect to take by that will, but cannot hold where it is no will; for you shall not make good the whole will, when in law it is no will at all.

As to the point of the husband's being *tenant by the curtesy*, it is rightly determined, that a husband may be tenant by the curtesy of a trust estate, because the greatest property of the kingdom is now under trust, but was never finally determined till the case of *Casburne* versus *Inglis* before your Lordship in *Hi-*

lary

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lary Term 1737, (1 Tr. Atk. 603.) where you held a husband might be tenant by the curtesy of an equity of redemption.

This will not affect the present case, because here the intention of the testator is to take from the husband all power of this estate, and that he should have nothing to do with it.

Suppose in this case a legal conveyance was directed to be made, the trustees must convey to persons in trust for her life, for her sole and separate use.

In the case of *Bennet* versus *Davis*, 2 *P. Wms.* 317. there were no trustees interposed, and yet the Master of the *Rolls* held the husband to be a trustee for the heirs.

Therefore the court will never hold the husband to be tenant by the curtesy contrary to the plain intention of the testator, and notwithstanding he has placed trustees here to prevent his being so.

Mr. Attorney General's reply.

First, as to the surplus interest of the eight thousand pounds.

The maintenance is not given out of the interest of the eight thousand pounds, but out of the general estate, for not a word is said out of what fund it should arise; and if this eight thousand pounds was severed, which it may be by this court, and not produce any interest, yet the infant is intitled to maintenance notwithstanding; and there is no presumption that the testator intended this interest should accumulate for the benefit of the infant.

Next, as to the principal point, where she charges all her estate, freehold, &c. with the legacies.

This depends on two things.

First, whether Doctor *Worth* intended she should have [illegible]s power during her infancy.

Secondly, if he did intend, then, whether this would not have been good in law, much more in equity.

To shew first this was the intention of the testator, the daughter at this very time was separate from the husband, and absolutely refused to live with him.

[707] As to the second thing:

There is no rule of law that prevents such an intention from taking effect; the only one pretended is, that an infant cannot dispose of real estate at twenty-one.

This is not applicable to the present case, but only where an infant takes in his own right, and not where he takes by a power from another person.

As in the instance put by Sir *Francis Moore* in Lord *Buckhurst*'s case, of a custom for an infant to alien at fifteen by feoffment.

A use by this case appears plainly to be declared by a feoffment, which could not be devised by a will.

It is said this does not operate by way of execution of her power, but by way of disposing of her interest.

Her will begins with saying, In performance of the power, &c.

It

It is a rule, where a person has two ways of doing a thing, and it cannot be done one way, it shall be done another, *ut res magis valeat quam pereat*; so that if it cannot be disposed of by way of interest, yet it shall be a good disposition by way of power, and so laid down in the case of *Rich* versus *Beaumont*, *Feb.* 9, 1727 (1).

This, said Lord Chancellor, is the only instance of a case made by the direction of the House of Lords for the opinion of the judges.

Mr. Attorney General laid it down, that a letter of attorney to an infant to sell real estate is good, and he may sell under that power.

Lord Chancellor asked, if there was any case determined to this purpose?

Mr. Attorney General answered, he knew of none, but went on general principles.

Upon the point of the eight thousand pounds devised to the infant *Mary Winsmore*, and whether she may still claim the real estate?

He said, though a will of real estate by an infant cannot be read as a will, yet it may be read so far as to shew the intention of the testatrix, that she should not have both the eight thousand pounds and the real estate too; and for this purpose cited the case of *Noys* versus *Mordaunt*, 2 *Vern.* 581. and therefore the will having no operation in law does not make it less a will. [708]

As to the point *of the tenant by the curtesy*;

If the court is of opinion this is not a good execution of the power, yet the husband cannot be tenant by the curtesy, because, in order to comply with the intention of the testator, your Lordship will direct the conveyance to be to the separate use of the wife for life, then to trustees to preserve the contingent remainders which may arise out of the execution of the power; and consequently, as there was no estate of inheritance in the wife during the coverture, the husband is not intitled to be tenant by the curtesy.

Mr. *Wilbraham*'s reply in the cross cause for the assignees of *Winsmore*.

He insisted the husband was tenant by the curtesy.

If the residue of the interest after the estate for life was not in the wife, where was it? The law will not suffer the fee to be in abeyance, and Mr. Solicitor General admitting, if the power is not well executed, the real estate descended upon *Mary Winsmore* the infant as heir to her mother, I apprehend the mother must have the inheritance; or else, what was there to descend upon the infant?

Lord Chancellor, thinking the principal point intirely new, took time to consider till the third of *August* 1749, on which day he gave judgment.

(1) 4 *Vin.* 168. *pl.* 26. S. C. 3 *Bro.* P. C. 308.

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LORD CHANCELLOR,

Mrs. *Winsmore* had four kind of estates.

First, a leasehold estate settled on the marriage of her father and mother, by a deed of the third of *December* 1642, made after marriage, but pursuant to an agreement before, for the term of ninety-nine years; the term expired, and was renewed on a lease for three lives, and so stood at Doctor *Worth*'s death.

The lease for lives Mrs. *Winsmore* is intitled to as a special occupant, being a freehold descendible, and consequently the husband could have no right, nor his assignees as standing in his place.

This being a freehold lease came to Mrs. *Winsmore*, and the daughter was intitled as a special occupant, being a freehold lease descendible, and consequently the husband could have no right, nor his assignees as standing in his place. I mention this to lay it out of the case.

[*709]

*The next kind is the personal estate that moved from *Dorothy Price*, the aunt of Mrs. *Winsmore*.

She, upon the 24th of *August* 1761, made her will, *and thereby devised several copyholds, which are chattels, and leaseholds, together with the residue of her real and personal estate, to her niece* Mary, *the daughter of Doctor* William Worth.

And under this will Mrs. *Winsmore* was intitled to about three thousand pounds.

There is no doubt but this part has survived to the husband, and the assignees under the commission of bankruptcy, as standing in his place, are intitled, and are not affected by the power in Doctor *Worth*'s will.

But upon that a question has been made on behalf of the infant daughter, the consideration of which I shall at present postpone.

The next kind is the personal estate of Doctor *Worth*, the residue of which is to be *for the separate use* of Mrs. *Winsmore*, and to be at her disposal.

Where a personal estate is given to the separate use of a feme covert, she is considered as a feme sole, and may dispose of it, and all that accrues, as she is beyond the age of seventeen.

The rule is, where a personal estate is given to the separate use of a feme covert, she is considered as a feme sole (1), and may dispose of it, and all that accrues upon it stands clear of any objection because she was above the age of seventeen, for several of the books go so far as to say, an infant above fifteen may give personal estate by will.

The next kind is the real estate of the father.

And here the question is, whether Mrs. *Winsmore*'s will is an execution of the power given her under the will of the father?

I shall divide it into three questions.

First, Whether the power has been well executed?

Secondly, Whether the plaintiffs in the original cause, who claim the residue of the real estate under the will of Mrs. *Winsmore*, are intitled in equity?

Thirdly, Whether the defendant *William Winsmore*, the bankrupt, is intitled to be *tenant by the curtesy* of his wife's estate, there being a child of the marriage?

The first is a very considerable question, and has never been determined.

(1) *Willats* v. *Cay*, Atk 2 vol 67. *Pettiplace* v. *Gorges*, 3 *Bro Cha. Rep* 8.

There

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There is no precedent, either in a court of law or equity, where it has been held, a power over real estate executed by an infant is good; and as I can find no precedent for it, I will make none.

An infant may execute a power where he is a mere instrument only.

As to the general question concerning powers in the large sense of the word;

There are several kinds of powers infants may execute:

As where an infant is a mere instrument or conduit-pipe, and his interest not concerned.

Lord *Coke*, in his *Comment on Litt. p.* 52. *sec.* 66. says;

Delivering seisin is a mere ministerial act, *and requires no judgment or discretion*; but though the latter words are expressed generally, the law anciently was not so; and in *Co. Litt.* 128. *a.* Lord *Coke* himself cites a passage out of the *Mirror*, in which it is expressly said, *an infant cannot be an attorney.*

As in the sense of an attorney in a court of justice he cannot be, but when we speak of an infant's being an attorney, it is a good deal different from these kind of powers.

Before the statute of *Uses*, the power was over the use, therefore all things necessary to be done over legal estates were done by way of conditions; and this was the method of exercising an authority over the legal estates; and at law an infant might perform a condition where it was for his benefit.

As to other kind of powers by an infant, I find no sort of authority.

It is said an infant may present to a church.

What is the reason? Because a presentation is not a thing of profit, of which the guardian can make any benefit; but the strong ground the law goes on is, there can be no inconvenience, because the bishop is to judge of the qualification of the clerk presented.

The strong ground the law goes on, in regard to an infant's presenting to a church, is, there can be no inconvenience, because the bishop is to judge of the qualification of the clerk presented.

It has been said, an infant may declare the use of a fine or common recovery, where he suffers it without a privy seal, and the use is good, and the fine and recovery shall stand (1).

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Why does the law allow it? because, for want of a remedy; for as the matter of record stands, the law supposes he was of full age, and will not presume a judge or commissioners would take the fine upon any other terms, and the deed to lead the uses being part of the fine, shall likewise stand, and therefore all this arises from a want of remedy.

The reason why the law allows a fine and recovery suffered by an infant to be good, is, that it supposes he was of full age, and will not presume a judge will take a fine upon any other terms, and a deed to lead the uses, being part of the fine, shall likewise stand.

But it is said an infant may, by the custom of *Kent*, and of several manors,* alien his estate; and if he may do it by custom, why not by a power?

(1) *Bac.* Uses, 67.

Now

HEARLE v. GREENBANK. By the custom of Kent, an infant may alien his estate; for custom is lex loci, and being so, it stands as strong upon this, as if a private act of parliament had been made for that purpose.

Now a custom is *lex loci*, and is presumed in law to have a reasonable commencement, just the same as if a private act of parliament was made to give an infant such a power, and a custom being *lex loci*, it stands as strong upon this, as if an act of parliament had been made for that purpose.

The case in *Moore* 512, has a resemblance to a power, but it is only put by Sir *Francis Moore arguendo*, at the bar, and no authority is cited to support it.

In *Brooke's Abr.* 230. and *Rolls* 611. it is laid down, "that "if after the stat. of 32 *H.* 8. a man seised of land infeoffs *A.* "and *B.* of this, to the use and intent to perform his will, and "then by his will reciting the said feoffment, and feoffees to "stand seised to the said use, declares his will to be, that the "said feoffees and their heirs stand seised of this to the use of *J.* "*S.* and the heirs of his body, this is a good devise of the land "by the intention of the devisor, though by no possibility the "feoffees can stand seised to the said use."

This case differs very little from the case put by *Moore*, which shews the land may be devised by custom, but not the use, and therefore I take this case not to be law.

The counsel for the plaintiffs have gone further, and insisted a *feme covert* may exercise such a power (1), and cited the case of *Rich* versus *Beaumont, in the House of Lords*.

It was so determined in the case of *Lady Travel, before Lord Chancellor King*; so in the common case, where a power is given to a woman tenant for life, to execute leases, and if so, it was argued, why not to an infant of the age of discretion?

[712] It has been said too, that the disability of a feme covert is not more favoured in law than the disability of an infant, or is rather a stronger disability.

In a marginal note in the case of *Moore* versus *Hussey*, in *Hob.* 95. and which note is allowed to be his own, is this observation, Coverture was not at common law so far protected as was infancy; and some other disabilities, *(scilicet) non sanæ memoriæ, ouster le mere* and imprisonment, though a woman covert hath no less judgment than discovert.

The separate examination of a feme covert on a fine is good, because when delivered from her husband her judgment is free.

But her disability doth not arise for want of reason; and it is upon this ground that the separate examination of a feme covert on a fine is good, because when delivered from her husband her judgment is free (2).

But an infant's disability is altogether from want of capacity.

Co. Litt. 246. *a.* "the dying seised of a disseisor shall take "away the entry of the wife after the death of her husband as "well for that she herself when sole might have entered and "recontinued the possession; *as also it shall be accounted her folly*,

(1) *Vide Standford* v. *Marshall*, ante 2 vol. 68.

(2) *Vid. Har. Co. Litt.* 121. a. note 1. *Cruise* on *Fines* 179.

"that

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" *that she would take such a husband which could not enter before the* " *descent.*"

But there, if the woman were within age at the time of her taking husband, then the dying seised shall not after the decease of her husband take away her entry; because no folly can be accounted in her, for that she was within age when she took husband, and after coverture, she cannot enter without her husband. Co. Litt. 246. b.

A dying seised shall not after the husband's decease take away the wife's entry, for no laches can be imputed to her (1), as after coverture she could not enter without her husband.

So in 10 *Co.* 43. *a. Mary Portington's* case, " the usage (saith " he) has always been upon a common recovery against hus- " band and wife, to examine the wife, and to grant a *dedimus* " *potestatem* to take her acknowledgment upon examina- " tion, as in the case of a fine." *But a common recovery against an infant although he appears by guardian, shall not bind the infant; for the infant has not such a disposing power of the land as the husband and wife have, but is utterly disabled by law to convey or transfer his inheritance or freehold to others during his minority.*

So that in law there is a total absolute disability in an infant, that by no manner of conveyance can he dispose of his inheritance.

There is an absolute disability in an infant, to dispose of his inheritance.

But then it has been insisted here is no sort of inconvenience, for Mrs. *Winsmore* being above the age of nineteen was as discreet as if she had attained the age of twenty-one, and the court may judge whether she had discretion enough to execute such a power.

This is of such latitude and extent, that I own I should be very sorry, as presiding in a court of justice, to be intrusted with; for it does not come in question till after the death of the infant, and no personal inquiry or examination can then be had of her judgment and discretion. [713]

For this I shall refer to *Hob* 225. *in pleading, an age certain must be set down, and not left upon telling twelve pence, or measuring a yard of cloth, as some books are, that the court may judge it an age of discretion*; for custom must not abrogate the law of nature, the law will not admit it in the case of a custom, then why should it in the execution of a power?

This is the general reason that determines my opinion.

And if the law had been otherwise, it must have happened in abundance of instances, for powers are given to infants to raise money, to make leases, &c.

Infants come in the course of succession into possession, and yet it has never been held he could exercise any such power over real estate; and the applying for several private acts of parliament shew the sense of mankind in this respect. Such an application was made in the case of the present Sir *Thomas Parkins*

It has never been held an infant could exercise such a power over real estate, and the applying for private acts of parliament shew the sense of mankind in this respect.

In the case of *Evelyn* versus *Evelyn*, 2 *P. Wms.* 603. the case of Lord *Kilmurray* versus Doctor *Grey*, is more fully stated than in any other place. " By the settlement a power was

(1) Vide ante 2 vol. 545.

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"reserved of charging divers of the lands at any time during his "life with 3000 *l.* a person borrowed this sum of the Doctor, "and having executed his power while an infant, died soon "after he came of age. The plaintiff his son brought his bill to "redeem, on payment of the principal sum borrowed; but "the court decreed it on the common terms, because here was "a power given him by act of parliament to raise the money, "and immediately to give security, which was actually "done."

I sent for the register book of this case, *Easter term*, 1712, and there it looks as if it was a general power executed by virtue of a private act of parliament.

I then sent for the record of the act of parliament, and there is an express clause to make all acts relating to the settlement, or in pursuance of any power therein, good, and that notwithstanding his minority, they shall be as valid as if he had attained the age of 21.

[714] Therefore when Lord *Kilmurray* made a settlement with such reservation, with the approbation of his trustees, the act of parliament operated upon it.

Taking it therefore in general, I am of opinion an infant cannot execute such a power.

The next consideration is, if there is any thing particular in this power.

First, As to the penning of the power:

That they should permit and suffer his daughter by any deed or writing, &c. (*notwithstanding her coverture*) *to give*, &c. *all his freehold*, &c.

What had the father therefore in view? Why, to exclude the disability of coverture, and this was all he intended to guard against; and if he likewise intended to exclude the disability of infancy, he would have taken care equally to express it.

The power is, to suffer his daughter, *notwithstanding her coverture*, to dispose of all his real estate; and if he had intended to exclude the disability of infancy, he would equally have taken care to express it, and *expressio unius est exclusio alterius*.

The daughter at the time of his death was upwards of 19 years of age; and though he might think it right to give her this power during coverture, yet not so during her infancy.

It is plain his view was to prevent the husband's influence, and to make all safe during her infancy.

Therefore from the penning of this power, a strong objection arises against her executing it during infancy, for *expressio unius est exclusio alterius*.

The construction of law on a power coupled with an interest, is very different from a naked power over another person's estate.

The construction of law on such a power as the present, which is coupled with an interest, is very different from a naked power over another person's estate, and that distinction has been taken in the cases of feme coverts.

The whole legal estate here is given to trustees.

First, As to the rents and profits, to the use of Mrs. *Winsmore* for life; and in the second place, to permit and suffer

Mrs.

Mrs. *Winsmore* to give and dispose of the lands, *&c.* by deed or will, *&c.*

So that she had an equitable interest in the lands, *&c.* and the equitable reversion in fee descended upon her.

If she does not dispose of it, where will it vest? *In herself!* [715] If not disposed of by her in her life-time, where will it descend? *To her daughter!*

If this then is a power to be exercised over her own inheritance, I am of opinion, it is such a power as an infant cannot exercise.

But suppose the execution of the power is bad, yet it is said the plaintiffs have an equity to compel the infant to let them take the real estate, for she shall not take both by the will, and against the will.

In general this rule is right, and founded on proper premisses but a wrong conclusion; for this purpose see the case of *Noys* .... *Mordaunt*, in 2 *Vern.* 581 (1).

I am of opinion the infant in the present case is not to be compelled to make her election.

For the instrument here being void as to the real estate, there is no instance where an infant has in such a case been compelled to make an election, for here is properly no will at all as to the lands.

Where an instrument is void as to the real estate, an infant is not compelled to make an election whether she will take by or against the will, for as to the lands it is properly *no will at all*.

It is like the case where a man executes a will in the presence of two witnesses only, and devises his real estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet for want of being executed according to the statute of frauds and perjuries, is bad as to the real estate; and I should in that case be of opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate, before he could intitle him to his personal legacy, because here is no will of real estate for want of proper forms and ceremonies required by the statute.

But the distinction between this case and that of *Noys* and *Mordaunt* is, there a father had disposed of his whole estate for the benefit of his children; here Mrs. *Winsmore* is whole real estate from her child, and therefore does not fall within that benevolent equity the court exercised in that case.

But what I principally rely on is, that here is no instrument which would pass the real estate.

The next question is, If assignees, the plaintiffs in the cross cause, as standing in the place of Mr. *Winsmore* the bankrupt, have a right to the rents and profits of Mrs. *Winsmore*'s real estate, as considering him in the light of *a tenant by the curtesy*.

(1) See also *Morris* v. *Burrowes*, *ante* 2 vol. 629.

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I am of opinion Mr. *Winsmore* could not be considered as *tenant by the curtesy*.

The rents under Dr. *Worth*'s will being to be applied to the separate use of the wife, and the trustees who had the fee in all the real estate being to permit her to dispose of it, the whole legal estate of the inheritance was in them, and therefore neither in law or equity was the husband tenant curtesy.

Under Doctor *Worth*'s will, the rents and profits are to be applied to the sole and separate use of Mrs. *Winsmore*, and the trustees who had the fee in all the testator's real estate, were to permit and suffer her to dispose, &c.

What was the effect of this? The whole legal estate of the inheritance was in the trustees.

However, it is said, a husband may be tenant by the curtesy of a trust.

But consider what is necessary to make *a tenant by the curtesy*; the wife must have the inheritance, and there must be likewise a seisin in deed in the wife during coverture (1).

It is true, she had the inheritance, because it descended till the execution of the power; but then the father, whose estate it was, has made the daughter *a feme sole* and has given the profits to her *separate use*; therefore what seisin could the husband have during the coverture; he could neither come at the possession, nor the profits (2).

Was there then any equitable seisin of the husband?

None at all; and to admit there was, would be directly contrary to the father's intention; and therefore neither in law or equity was the husband *tenant by the curtesy*.

Another question has been made, with regard to the interest of the 8000 *l.* given by the will of Mrs. *Winsmore* to her daughter.

I am of opinion, under the circumstances of this case, she is not intitled to the interest.

Where legacies are given payable at a certain time, they carry no interest, for till the day of payment comes it is not demandable; but if given to a child, the court will allow it by way of maintenance (3).

The general rule is, where legacies are given payable at a certain time they carry no interest, for interest is for delay of payment, and consequently till the day of payment comes no interest is demandable.

But I do admit at the same time, where a legacy is given by a father to a child, though the legacy is not payable but at a certain time, yet the court allows interest.

But in all these cases the ground the court goes on, is giving interest by way of maintenance.

Here Mrs. *Winsmore* has allotted maintenance for her daughter from the general fund of her personal estate: there is another

(1) *Vide de Grey* v. *Richardson*, *ante*

(2) *Roberts* v. *Dixwell*, *ante* 1 vol. 607.

(3) See *Heath* v. *Perry*, *ante* 101. notes 1 and 2.

thing obfervable, the contingency in her will, of the daughter's dying before 21; I agree it is a condition fubfequent, but ftill it fhews the view of the teftatrix, and that fhe faw it might never be her daughter's, and therefore to give her intereft would be contrary to the intention of the teftatrix.

There are feveral cafes where this court have made a great ftretch to give children intereft on legacies, particularly *Acherley* verfus *Vernon*, 1 *P. Wms.* 783, but that went on particular circumftances.

Therefore I am of opinion fhe can have no more intereft than the maintenance in the mean time.

As to the eftate left by Mrs. *Dorothy Price*, the aunt of Mrs. *Winfmore*, that muft belong to the affignees of Mr. *Winfmore* under the commiffion of bankruptcy againft him, as ftanding in the place of the hufband.

But then it is infifted, as Mr. *Winfmore* had made no provifion for his wife, or the iffue of the marriage, that his affignees fhall not be permitted to touch this, till they have made fome provifion for the iffue of the marriage.

And fo it was held in two cafes before Lord Chancellor *Cowper*; and I was alfo clearly of the fame opinion in the cafe of *Jewfon* verfus *Moulfon*, *October* 27, 1742. (2 *Tr. Atk.* 417.)

But I can find no cafe where the court have done it in the cafe of affignees of a bankrupt after the death of the bankrupt's wife: and here too the iffue of the marriage is fo well provided for, that I am of opinion the court ought not to make this the firft precedent of it, whatever they might do in a cafe not fo circumftanced.

But the prefent is not fuch a cafe, as would incline the court to make a ftride further than any of the former cafes have gone.

His Lordfhip declared, that as to the real eftate devifed by the will of Doctor *Worth* to his truftees, the will of Mrs. *Winfmore* being made during her infancy, was not a good execution of the power relating thereto contained in Doctor *Worth*'s will, and that the inheritance of fuch real eftate is defcended to the defendant *Mary Winfmore* the infant, who is heir at law both of Mrs. *Winfmore* her mother, and of Doctor *Worth*; and that the defendant *William Winfmore* the bankrupt is not intitled to be *tenant by the curtefy* thereof.

He alfo declared that the leafehold eftate, comprifed in the fettlement made on the marriage of Doctor *Worth* with *Mary Price*, dated the 3d of *December* 1722, which is now held by leafe for lives, belonged to Mrs. *Winfmore* by virtue of the fettlement, and on her death came to the infant her daughter and heir, and therefore directed both bills, fo far as they feek any relief touching the faid leafehold eftate, or touching the real eftate of Doctor *Worth*, to be difmiffed without cofts. [718]

He alfo declared that the refidue of Doctor *Worth*'s perfonal eftate, being given by his will in truft for the feparate ufe of Mrs. *Winfmore*, was not fubject to the debts, power or controul of her hufband, and alfo the rents and profits of Doctor *Worth*'s

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real estate devised to her separate use accrued during her life, and the profits and proceeds of both these funds ought to be considered as the separate personal estate of Mrs. *Winsmore*, not subject to the debts or power of her said husband; and that the same are well disposed of by Mrs. *Winsmore*, she being above the age of seventeen at the time of making her will; and therefore directed the cross bill brought by the assignees under the commission of bankruptcy against Mr. *Winsmore*, so far as it seeks any relief touching the personal estate of Doctor *Worth* or the rents and profits of his real estate, to be dismissed without costs.

He also declared that the legacy of eight thousand pounds given by Mrs. *Winsmore's* will to her daughter, subject to the contingencies therein mentioned, will not carry interest till the same shall become payable according to the will, and that the annual sums thereby respectively given for her maintenance ought to be deemed as given in lieu of interest.

And in the cross cause his Lordship also declared, that what the late Mrs. *Winsmore* was intitled to under the will of her aunt *Dorothy Price* belonged to her husband, and is now vested in the assignees under the commission of bankruptcy against him, who are the plaintiffs in that cause.

He also declared that the copyhold estates of *Dorothy Price*, though for life, yet being by the custom of the manor, whereof the same are parcel, a chattel interest, the same, and also the rents and profits thereof received by Doctor *Worth* in his lifetime, or his executor since his decease, ought to be deemed part of her personal estate, and brought into the account before the Master; and it being admitted, that the sum of fourteen hundred pounds was paid by Doctor *Worth* to Mr. *Winsmore* after his marriage with his wife, on account of what she was intitled to, he declared the same ought to be deemed as paid in part of the personal estate of *Dorothy Price* (1).

(1) *Reg. Lib.* A. 1748. fol. 698.

Case 268. *Potter* versus *Potter*, *July* 26. 1749, *the last Seal after Trinity Term.*

[719]

S. C. 1 Ves. 274. Amb. 98.

When the heir at law by his answer to a bill brought to establish a will, admits it to be duly executed, and to the purport as set forth, saying, at the close of it, he is the heir at law of the testator, is not sufficient to intitle him to the inspection of the title deeds and writings belonging to the estate.

A Bill was brought by a devisee of all the estate real and personal of the late archbishop *Potter*, to establish the will and codicils, and to carry the trusts of them into execution.

The heir at law who is made a defendant, does not controvert either the will or codicils, but admits they were duly executed, and to the purport as they are set forth in the bill.

It was moved to-day in behalf of the heir at law, that all the title-deeds and writings of the late archbishop's estate might be produced for his inspection, without pointing out in whose custo-

dy

dy they are, or ſpecifying the nature or ſubſtance of the deeds he requires. POTTER *v.* POTTER.

The Attorney and Solicitor General, counſel with the motion, inſiſted, that notwithſtanding motions of this kind are generally made, where an heir at law that is diſinherited is the plaintiff, yet there was equal juſtice, that he ſhould have the inſpection of the deeds, where he is the defendant, becauſe where the eſtate is totally deviſed away from him, it is but natural equity that he ſhould be ſatisfied, whether he is lawfully diſinherited.

Mr. *Capper* of the ſame ſide cited the caſe of *Smith* verſus *Smith*, before Lord *Hardwicke* in 1745, in ſupport of the motion.

LORD CHANCELLOR,

I do not remember, nor do I believe, ſuch a motion as is now made in behalf of the heir at law was ever granted, where he is a defendant to a bill of this kind.

Though I will not ſay but upon ſome particular circumſtances he may be intitled to what is now prayed.

As ſuppoſe he ſhould in his anſwer inſiſt upon ſome old entail which has not been barred by a recovery, and conſequently ſtill exiſting, or controvert the legality of the will, or the execution of it, or inſiſt that only a part of the real eſtate is deviſed away, and of courſe the remainder deſcends, and he expreſsly claims it as heir at law.

But in the preſent caſe the heir at law does not ſo much as deny any one circumſtance, either as to the execution of the archbiſhop's will, or his power of deviſing, but admits the whole, [720]
as it is ſet forth by the plaintiff in his bill.

And barely ſaying at the cloſe of his anſwer, that he is the heir at law of the teſtator, is not ſufficient to intitle him to an inſpection of the deeds; beſides, he does not ſo much as point out what the deeds are that he wants to inſpect, nor the ſubſtance of them, which he might do though not in his cuſtody.

Upon the whole, here is no pretence for what the heir at law prays by the motion, and therefore he muſt take nothing by it.

Turwin verſus *Gibſon*, *July* 31, 1749. Caſe 269.

IT was inſiſted by the petitioner *Margaret Turwin*, as ſhe is the repreſentative of *Arthur Harding* her firſt huſband, and he has left bond debts, that *Wade*, the ſolicitor for *Arthur Harding*, who was the plaintiff in the original cauſe, has no right to be paid out of the ſum decreed for the plaintiff in preference to *Harding*'s bond creditors.

LORD CHANCELLOR,

I am of opinion that a ſolicitor, in conſideration of his trouble, and the money in diſburſe for his client, has a right to be paid

A ſolicitor who is in diſburſe for his client has a right to be paid out of a duty decreed to an adminiſtrator, and a lien upon it, before the bond creditors of the deceaſed; nor can the adminiſtrator controvert this rule, by inſiſting on applying the aſſets in a courſe of adminiſtr-

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paid out of the duty decreed for the plaintiff, and has a lien upon it, before the bond creditors of the deceased plaintiff, and it is constantly the rule of this court; neither can the administratrix controvert this rule, by insisting upon applying the assets in a course of administration (1).

Upon another petition a short time before, Lord Chancellor laid down the same rule.

(1) *Vide Taylor* v. *Lewis*, post 727.

Case 270. *March* versus *Head*, *July* 31, 1749.

A woman who had 1000*l.* in articles before marriage had no other provision than only a covenant from the husband, that he would consider himself as a freeman of *London*: On her father's death she became intitled to 1800*l.* more, and applies for a further provision. *The court, from the care it takes of the interest of feme coverts, will on an accession of fortune to the wife, oblige the husband to make a further provision.*

A Woman who had a thousand pounds to her fortune, had no other provision under articles before marriage than only a covenant from the husband, that he would consider himself as a freeman of *London*, and if she survived him, she should have such a share of his personal estate as belongs to the widow of a freeman.

Upon the death of the wife's father and mother, she as next of kin became intitled to eighteen hundred pounds more.

[721] The husband and wife live separate; an application was made now in behalf of the wife for a further provision, on this addition of fortune.

LORD CHANCELLOR,

This court, according to the power it exercises, and the care that it always takes of the interest of *feme coverts*, will either, where there is no provision at all for the wife, on money coming to her, oblige the husband, before he is permitted to touch it, to make some provision for her; or where there is a slender provision only made before, on an accession of fortune to the wife, if it be considerable, (not if a trifle only), oblige the husband to make a further provision (1).

I think in the present case, the provision made for the wife a very slender one, and of a very precarious nature; and therefore I will refer it to a Master to receive proposals for a further provision on the behalf of the wife, in proportion to this accession of eighteen hundred pounds; and ordered it accordingly (2).

(1) *Jewson* v. *Moulson*, ante 2 vol 420. (2) *Reg. Lib.* B. 1748. fol. 498.

Hall versus *Hall July*, 31, 1749 (1). Case 271.

AN application was made to the court to compel a young gentleman, who has been placed at *Eton* school by his guardian, to return there again.

The guardian is a proper judge at what school to place his ward, and the court will not indulge the infant in being put to a private tutor, or going to another school, and if he refuses to go will take a proper course to compel him.

The lad of sixteen years of age being present in court, and having no reasonable grounds of complaint against the master of the school, Lord Chancellor would not indulge him in being put to a private tutor, or going to another school; but said, his guardian was the proper judge at what school to place him, and where he had sent him, was a school of very great reputation: and that if he should refuse to go, he would take the proper course to compel him.

His Lordship mentioned an instance in Lord *Macclesfield*'s time, of a young gentleman who had been placed by his guardian at the University of *Cambridge*, and on his absenting himself from thence, and refusing to return, Lord *Macclesfield*, on application to him by the guardian, sent him to the University in the custody of his own tipstaff.

A young gentleman who had been placed at the University of *Cambridge*, on absenting himself, and refusing to return, was sent back by Lord *Macclesfield* in the custody of his own tipstaff.

Here the lad agreed to go back to *Eton*, and was indulged by the court in a fortnight's time for that purpose.

(1) *Reg. Lib.* A. 1743. fol, 526.

Harris versus *Harris*, *February* 7, 1750. Case 272.

[722]

THE plaintiff, a mortgagee, brought a bill in conjunction with several bond creditors, against the heir at law of the mortgagor, for a sale of the mortgaged premisses.

A decree for a sale of an estate in mortgage, the master reported a stated sum due to the mortgagee for principal and interest, and report confirmed, as the mortgage is at 5 *per cent.* and there is another mortgagee and creditors besides, from the time of the Master's report being confirmed, it shall carry only 4 *per cent.*

There was a decree accordingly, and the mortgagee was directed to be paid his principal and interest in the first place, out of the money arising from the sale.

The Master made a report of a stated sum due for principal and interest, and the report was confirmed.

The plaintiff, the mortgagee, moved to day that the Master might compute subsequent interest and costs upon the sum reported due

The estate sold under the decree, produced about a thousand pounds more than would pay the original mortgage; and one of the

Harris v. Harris.

the defendants is a subsequent mortgagee; but there was not near enough arising from the sale to pay the second mortgagee, and bond creditors.

The rest of the plaintiffs, and the defendants, opposed the motion, and endeavoured to take a difference between the present bill and a bill of foreclosure, insisting, that in the latter, the court directs the Master to allow subsequent interest upon the sum reported due, because it is a compensation to the mortgagee for being kept out of his money, by the court's allowing time to the mortgagor to redeem.

But here a sale is prayed in the first instance, and the interest of the creditors are concerned, and therefore it would be hard to give interest upon interest in favour of one creditor to the prejudice of the rest.

Lord Chancellor,

This case differs from the common one of a foreclosure (1), and it would be rather too much to give such an advantage to the mortgagee over the rest of the creditors, especially as the mortgage carries five *per cent* (2).

His Lordship therefore proposed to his counsel, that from the time of the Master's report being confirmed, it should carry only four *per cent.* the plaintiff acquiescing in this proposal, his Lordship gave directions accordingly (3).

[723]

(1) *Butter* v. *Duncomb*, 1 *P. W.* 453. *Brown* v. *Barkham* 1. *P. W.* 653.

(2) This does not appear in the Register's Book.

(3) *Reg. Lib.* A. 1750. fol. 184.

Case 273. *Farrant* versus *Lovel*, *Feb.* 12, 1750.

S. C. Amb. 105. The court will grant an injunction at the suit of a ground landlord to stay waste in an under lessee, who holds by lease from the original lessor.

A Bill was brought by a ground landlord to stay waste in an under-lessee, who held by lease from the original lessee (1).

Lord Chancellor,

A certificate being produced of the waste, I am of opinion the plaintiff has the same equity as in other cases of injunctions.

A remainder man in fee may have an injunction to stay waste in the first tenant for life notwithstanding an intermediate estate for life.

As where there is tenant for life, remainder for life, remainder in fee, yet the court, on a bill brought by remainder-man in fee, to stay waste in the first tenant for life, will, notwithstanding the intermediate estate for life, upon a certificate of the waste, grant an injunction (2).

(1) It appears from the Register's Book, that this motion was made by *Farrant*, who was the assignee of a lease granted by one *Atkinson*, to whom the ground rent had been constantly paid. *Reg. Lib.* A. 1750. fol. 184.

(2) *Robinson* v. *Litton*, *ante* 210. *Garth* v. *Cotton*, post 755, 756.

So,

So, where a mortgagee in fee in possession commits waste by cutting down timber, and the money arising by the sale of the timber is not applied in sinking the interest and principal of his mortgage, the court, on a bill brought by the mortgagor to stay waste, and a certificate thereof, will grant an injunction.

FARRANT v. LOVEL. **If a mortgagee cuts down timber, and does not apply the money arising from the sale in sinking the interest and principal, the mortgagor may have an injunction to stay waste.**

So, likewise, where there is only a mortgage for a term of years, and the mortgagor commits waste, the court, on a bill by the mortgagee to stay waste, will grant an injunction, for they will not suffer a mortgagor to prejudice the incumbrance (1).

So, where the mortgagor commits waste, the court will grant the mortgagee an injunction, for they will not suffer the mortgagor to prejudice the incumbrance.

For these reasons his Lordship granted an injunction to stay waste.

(1) *Robinson* v. *Litton, ante* 219

Rattray versus *Darley* *February* 1750. Case 274.

[724]

MR. *Rattray* and his wife filed an original bill against *Darley* the 14th of *May* 1750, who, on the third of *July*, put in a plea and answer, and the plea was allowed. On the 17th of *May*, *Darley* filed a cross-bill against *Rattray* and his wife, to which, on the 25th of *October* last, they put in their answers, to which he filed fifty-five exceptions: on the 13th of *December* last, *Rattray* and his wife filed their amended bill against *Darley*, to which he appeared on the 24th of *December*, and upon a suggestion that the plaintiffs in the original cause have lost their priority of suit by means of their amended bill, and have also put in an insufficient answer to the cross-bill: *Darley* moved before the Master of the *Rolls* the first day of this term, *that he might have six weeks time to put in his plea, answer, or demurrer, to the amended bill, after the defendants* Rattray *and his wife shall have answered the plaintiff* Darley's *cross-bill.*

R. and his wife filed an original bill, to which the defendant put in his plea, and it was allowed; D. filed a cross bill against R. and his wife, to which they put in their answers, and exceptions were taken; then R. and his wife filed their amended bill against D. who appeared, and prayed six weeks time to put in his answer to the amended bill after R. and his wife shall have answered the cross bill. ***The plain[illegible] he cross-bill hav[illegible]ng pro[illegible] a report that the answer of* R. *to it was insufficient,* R. *by that means lost [illegible]rity of suit.***

His Honor gave *Darley* a month's time.

The plaintiffs in the original bill, apprehending this to be irregular, moved to day that the order made in these causes on the 23d of *January* may be discharged.

It was insisted for the motion by Mr. *Tracy Atkyns*, that if an answer appears upon the records of the court, and has never been referred for insufficiency, the court will not examine whether it is sufficient or not.

That

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That the bare taking exceptions to an anſwer can never be ſaid to affect it in any reſpect, for they are little more than a memorandum delivered by one clerk in court to another, and is a private tranſaction, and not of record.

That the plaintiff muſt take another ſtep to ſubſtantiate his exceptions, and procure an order to refer them, and muſt alſo have a report of the inſufficiency of the anſwer, or elſe, to all intents and purpoſes it will be conſidered as an anſwer, notwithſtanding the exceptions; and if ſuch a practice was allowed, it would be attended with ill conſequence to the proceedings of this court, for then, a plaintiff, to elude juſtice, would have nothing to do, but to take exceptions, and by that means gain time, and delay the plaintiff in the progreſs of the cauſe.

And therefore inſiſted that the ſpecial order for time is irregular, and ſhould have been a general one only.

[725] Mr. *Woodford*, counſel for the plaintiff in the croſs-cauſe, and defendant in the original, inſiſted, that if a plaintiff in an original bill, after the croſs-bill is filed, amend his bill in things material, it is, as to the amendments, a new bill, and the plaintiff in the original bill ſhall be bound to anſwer the croſs-bill, which was filed prior to the amendments made to the original bill, before ſuch time as the plaintiff in the original bill ſhall have an anſwer to his amendments; and as the amended bill muſt be anſwered altogether, ſo the priority ſeems in ſuch caſe to be loſt as to the whole.

He cited for this purpoſe the caſe of *Buckeridge* verſus *Blundel*, before Lord Chancellor *King*, in *H. T.* 1726, and the caſe of *Steward* verſus *Roe*, 2 *P. Wms.* 435.

And inſiſted, that as the plaintiff in the croſs-cauſe did on the 28th of *January* obtain an order to refer the exceptions, it is plain this is no affected delay, but that he is in earneſt to proceed on his exceptions, and therefore the order was regular, and ought not to be diſcharged.

LORD CHANCELLOR,

As the anſwer to the croſs-bill is not reported inſufficient, I do not lay much ſtreſs on the argument, that the plaintiffs in the original bill have loſt their priority (*Vid. the caſe of Long* verſus *Burton*, *November* 12, 1741, before Lord *Hardwicke* (1).

The ſubſtantial objection on the part of the motion is, that here is an order obtained for time to anſwer an amended bill, after the anſwer is put in to the croſs-bill, to which there are exceptions only delivered to the plaintiff's clerk in court, in the original bill, but no proceedings ſince to get a report of the anſwer's being inſufficient.

The Maſter has not yet determined, nor the court whether this be an inſufficient anſwer: and therefore the queſtion is, if it ought not to be conſidered to all intents and purpoſes as an anſwer.

But as the plaintiff in the croſs-cauſe, ſince he obtained the order of the 23d of *January*, has got a ſubſequent one for referring the exceptions; I will not give an opinion now, but let

(1) *Ante* 2 vol. 218. S. C.

this

this motion stand over till the second seal after the term, and in the mean time, let the plaintiff in the cross-cause procure the Master's report. RATTRAY v. DARLEY.

N. B. Darley, the defendant in the original, and plaintiff in the cross bill, procured the Master's report, that the answer of *Rattray* was insufficient, and by that means the latter lost his priority.

Birch versus *Sir Lyster Holt, February* 28, 1750. Case 275. [726]

LORD CHANCELLOR,

I Have known numbers of applications to this court in the nature of an injunction, or rather for leave to re-erect a nusance, and to put a mill-dam, as in this case, into the same situation it was in before it was cut down, but as this is prayed by the present motion, while the right is unheard and undetermined, the court have as constantly denied the motion, as it came before them, and all that they have done, is to put it in the most expeditious way of being tried (1).

Where there is a motion to put a mill-dam into the same situation it was in before it was cut down, the court will not grant it, while the right is unheard and undetermined, but will put it in the most expeditious way of being tried.

The case relied on by the plaintiff's counsel was *Arthington* versus *Fawks et al'*, 2 *Vern.* 356.

His Lordship, to accelerate the determination of the right, directed the defendant to bring an action of trespass, and every thing to be admitted on both sides necessary for trying the mere right.

(1) *Anon.* 2 *Ves.* 414. *Weller* v. *Smeaton*. 1 *Bro. Cha. Rep.* 572. See Lord *Tynham* v. *Herbert ante* 2 vol. 483. notes 1 and 2.

March 22, 1750. *At the last Seal before Easter Term.* Case 276.

A Bill was brought by a husband and wife, for a demand in the right of the wife, the husband dies.

Bill by husband and wife for a demand in her right, the husband dies, it is in the nature of a chose in action and survives to her, and the cause does not abate.

LORD CHANCELLOR,

It is in the nature of a chose in action, and survives to her, and the cause does not abate by the husband's death (1).

(1) *Vide Coppin* v. —— 2 *P. W.* 495. *Bond* v. *Simmons, ante* 21.

Case 277. Done versus Peacock, March 22, 1750. Fourth Seal before Easter Term.

Where one, out of several defendants, obtained an order to plead, answer or demur, but not to demur alone, and demurred to the bill as containing different matters, and inconsistent, and answered nothing more than the charge of combination and confederacy only, the court inclined to think it was not answering pursuant to the order.

A Motion was made by Mr. *Evans* to discharge an order, where one, out of several defendants, had obtained an order to plead, answer and demur, but not to demur alone, because he had evaded the order; for after demurring to the bill, as containing different matters, and inconsistent with each other, he answers to nothing more than the charge of combination and confederacy only, and this is what he must absolutely do to support even his demurrer, which, without it, must have fallen to the ground, and therefore cannot be considered as an answer.

[727]

Lord Chancellor inclined to think that this is not answering in pursuance of the order (1), but as the demurrer might soon be determined, the delay would be of very little consequence to the plaintiff, and therefore would not discharge the defendant's order for time.

Where a man demurs, for that the bill contains several matters not relating one to the other, if he does more than deny combination and confederacy, he over-rules his demurrer.

In 1 *Vern.* 463. *Hester* versus *Weston*, it is laid down, that where a man demurs, for that the bill contains several matters not relating one to the other, and in some whereof the defendant is not concerned, if by the answer defendant doth more than barely deny combination and confederacy, he over-rules his demurrer.

(1) *Vide Stephenson* v. *Gardiner*, 2 *P. W.* 286. *Lee* v. *Pascoe*, 1 *Bro. Cha. Rep.* 78. *Mitford's* Plead. 170.

Case 278. *Stapleton* versus *Conway*, March 30, 1750.

1 Vef. 427. S. C. Where a contract is made in *England* for a mortgage of a plantation in the *West-Indies*, no more than legal interest shall be paid upon mortgage.

LORD *Hardwicke* said in this cause, that if a contract is made in *England* for a mortgage of a plantation in the *West-Indies*, no more than legal interest shall be paid upon such mortgage, and if in such case there is a covenant in the mortgage for payment of eight *per cent.* interest, it would be within the statute of usury, notwithstanding this is the rate of interest where the land lies (1).

(1) See *Connor* v. *Bellamont*, *ante* 2 vol. 382. note 1.

Taylor versus *Lewis*, *December* 20, 1750, *among the Cause Petitions*. Case 279.

THE question was, Whether the client that has already paid his solicitor, who satisfied the clerk in court his whole bill, is liable to make good the fees of *the six* clerk, where the *sixty* clerk absconds, or is insolvent.

2 Ves. 3. S. C. A six clerk is not obliged to deliver papers to the plaintiff till his fees are paid, though the plaintiff had paid his solicitor who had satisfied the clerk in court his whole bill (1).

The counsel for the plaintiff cited 2 *P. Wms.* 460. *Farewell* versus *Coker*, and relied upon an order of Lord Keeper *Bridgman's*, which limits the number of under-clerks. *Thursday the 18th of June*, 20 *Car.* 2. 1688.

It was insisted by the counsel for Mr. *Reynardson* the six clerk, that he is not obliged to deliver papers to the plaintiff until he is paid his fees, and relied upon an order of Lord *Clarendon's*.

(2) *Vide Gray* v. *Cockeril*, *ante* 2 vol. *Ves.* 25. 114. *Turvin* v. *Gibson*, *ante* 720. *Anon* 2.

Lethieullier versus *Tracy*, *December* 20, 1750. Case 280.

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S. C. post. 730, 774, 784, 793. S. C. Amb. 204. 220.

SIR *William Dodwell* by his will devised all his estates already purchased, or to be purchased by his trustees, to *Mary Dodwell* his daughter and only child for life, with remainder to trustees and their heirs, to preserve contingent remainders, remainder to the first son in *tail male*, and to the second and every other son of his daughter *Mary Dodwell* in tail *general*, and in default of such issue, remainder to the daughters of his daughter *Mary Dodwell*; and in case his daughter died without issue of her body living at her decease, remainder to Sir *Henry Nelthorpe* in tail; and in default of issue by him to *Smart Lethieullier* for life, with remainder to his sons in tail male, and in default of such issue remainder to *Charles Lethieullier*.

Sir *W. D.* by his will devised all his estates purchased or to be purchased to *M. D.* his daughter for life, with remainder to trustees to preserve, *&c.* remainder to the first son in tail male, and to the second, *&c.* in tail general; and in default of such issue, remainder to the daughters, *&c.* and if *M. D.* died without issue, remainder to Sir *H. N.* in tail, with several remainders over. *M. D.* after 21 marries and subsequent to it executes a deed by which she conveys the reversion in fee of the lands purchased expectant on the several remainders under the will to *C. B.* and his heirs in trust for several uses and covenants to levy *a fine sur concessit* to the uses of the deed, and recites the limitations under the will in the order mentioned; with a proviso that the uses declared by the deed shall not take place till after all the limitations under the will. *A fine levied accordingly* It was insisted *M. D.* had by the fine forfeited her estate for life; but the court held it was only a fine of the reversion, as the deed expressly recites all the intervening estates for life under the will, and limits uses after all these.

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LETHIEULLIER v. TRACY.

The daughter arrives at her age of twenty-one and marries, and subsequent to her marriage executes a deed bearing date the 31st of *December*, 1746, by which she conveys the reversion in fee of the lands purchased by the trustees under the will, expectant on the several remainders under the will, to *George Brampston*, Esq; and his heirs, in trust for the several uses and purposes therein declared; and covenants to levy a *fine sur concessit* to the uses of the deed, and in the deed and fine recites the limitations under the will in the words and order in which they are mentioned there, with an express proviso that the uses declared by the deed shall not take place till after all the limitations under Sir *William Dodwell*'s will.

A fine was levied accordingly in *Hilary* term 1746.

In *January* 1749, an order was obtained by petition to Lord Chancellor for a conveyance from the trustees of all the lands purchased under the will of Sir *William Dodwell*, according to the limitations therein; and particularly that the last remainder in fee might be conveyed to the daughter of the testator the petitioner, late *Mary Dodwell*, and now *Mary Tracy*, the wife of *Thomas Tracy*, Esq.

After the pronouncing of this order, Mr. *Tracy*'s counsel being of opinion, that a conveyance to her in pursuance of this [729] order, being subsequent to the deed of 1746, and the fine, would defeat them both, applied to the court to vary this order; and instead of the last remainder in fee being conveyed to Mrs. *Tracy*, that it might be conveyed to *George Bramstone*, Esq; and his heirs, in trust for the several uses, intents and purposes of the deed and fine in 1746.

Mr. *Smart* counsel for the *Lethieulliers*, two of the remainder-men, prayed the petition might stand over, that he might have an opportunity of inspecting the deed and fine on their behalf, to see if Mrs. *Tracy* had not forfeited her estate for life by levying this fine, as, according to the state of it in his brief, it seemed to be a fine of her estate for life.

Lord Chancellor ordered the deed to lead the uses of the fine, and the fine itself to be read; and then said, that it appeared to him plainly to be a fine of the reversion, because it expressly recites all the intervening estates under the will, and limits uses after all these.

If *M. D.* had levied *a fine sur concessit* of her estate for life, yet as it is a trust estate, and there are limitations to trustees to preserve, &c. the fine would not have worked a forfeiture of her estate for life, because it cannot affect the subsequent remainders, as there are trustees to preserve them.

I will suppose, for argument's sake, that Mrs. *Tracy* had levied *a fine sur concessit* of her estate for life; yet as it is a trust estate, and there are limitations to trustees to preserve contingent remainders, I am of opinion the fine would not work a forfeiture of her estate for life, because it cannot at all hurt or affect the subsequent remainders, as there are trustees under the will to preserve *them*, and therefore such a fine would in equity operate

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at most as a grant only of such interest as she had a power to grant (1). LETHIEULLIER v. TRACY.

Mr. *Smart* objecting, that the expression in the indenture of fine, all lands, *&c.* of which Mrs. *Tracy* was seised, must refer to an estate in possession, for it does not say *lands she was seised of in reversion:*

Lord Chancellor said there was no weight in this objection, because the technical expression is, lands, tenements and hereditaments of which she now stands seised in reversion, *and not that she was seised of a reversion in lands, &c.*

Mr. *Smart* also objected to the proviso in the deed, that the fine should not affect or operate upon the estate for life of Mrs. *Tracy*, or any other of the particular estates recited to be by the will of Sir *William Dodwell* limited in use to the several persons precedent to the reversion in fee in Mrs. *Tracy*.

LORD CHANCELLOR,

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The proviso in the deed, that the limitations thereby created should not disturb or defeat the estate for life to Mrs. *Tracy, &c.* under the will, is *ex abundanti*; and if there had been no such proviso, should have been clearly of opinion that the uses of this deed would not have controuled the estate for life to Mrs. *Tracy* under the will.

The proviso that the limitations in the deed should not disturb Mrs. *Tracy*'s estate for life under the will is *ex abundanti*; for if there had been no such proviso, the uses of the deed would not have controuled Mrs. *Tracy*'s estate for life under the will.

But on the importunity of Mr. *Smart*, his Lordship directed the petition to stand over to the next day of petitions, to give the remainder-man's counsel an opportunity of inspecting the deed and fine.

(1) So *Penhey* v. *Hurrell*, 2 *Freem*. 213. Lady *Whetstone* v. *St. Bury*, 2 *P. W*. 14. So where a tenant for life of the *legal* estate made a mortgage, and levied a fine, the court decreed that the mortgagee should hold during the life of the mortgagor; notwithstanding the remainder-man had recovered at law upon the forfeiture. *Willis* v. *Fineux*, *Prec. Cha*. 108. Sed contra, *Prec. Cha*. 572, 591.

January 21, 1750-51, *the Petition in the Cause of Lethieullier and Tracy came on again.*

LORD CHANCELLOR disallowed all Mr. *Smart*'s objections, and declared the Master had done right in altering the settlement to the shape it now is, and that the exception to it should be over-ruled, and the plaintiffs forthwith to execute the same. Ante 728. post 784, 793. S. C. S. C. Amb. 204, 220.

Lord *Hardwicke* said, where *a fine sur concessit* is levied by a tenant for life, reversioner in fee expectant on several limitations in a deed or will, a court of equity will never construe such a fine to work a wrong, but operates only on the trust to preserve the contingent remainders, and not on the legal estate; for

Where *a fine sur concessit* is levied by a tenant for life, reversioner in fee expectant on several limitations in a deed or will, a court of equity will never construe such a fine to work a wrong.

Lord *Talbot* in the case of *Hoskins* and *Hoskins*, and myself, in a cause that came before me afterwards, were of opinion, that a person so intrusted levying a fine creates no wrong, but operates so as to grant all the conusor had a power to grant; for whatever may be the construction of such a fine levied by tenant for life of a lifehold estate at common law, in equity it would not be considered as a forfeiture (1).

(1) See *ante* 729. and the cases in note there.

Case 281. [731]

Elizabeth Rigden, Widow, one of the Daughters of George Everinden deceased, by Ann his Wife also deceased, William, Thomas and George Rigden, the only Children of William Rigden and Sarah his Wife both deceased, who was another of the Daughters of George Everinden by Ann his Wife, } Plaintiffs.

Margaret Vallier Widow, another Daughter of the said George Everinden by Ann his Wife. } Defendant.

March 25, 1751 (1). *Lord Chancellor gave Judgment.*

S.C. 2 Vef. 252. *G. E.* seised of a gavelkind estate, by deed-poll, in consideration of natural love to his wife and children did grant to his two daughters *Margaret* and *Hannah* the rents of his lands in *L.* equally to be divided betwixt them, paying 5*l.* to the mother during her life, and after her decease to his two daughters, to hold to them and their heirs, *equally to be divided betwixt them. Lord Hardwicke was of opinion that the words in the limitation to the daughters created a tenancy in common, whether the instrument be considered as a deed or a will* (2).

GEORGE *Everinden* being seised of an estate in *Kent* of the tenure of gavelkind, by *deed-poll* dated the 5th of *August* 1710, in consideration of natural love to his wife and children, did give, grant and confirm to his two daughters *Margaret* the defendant, and *Hannah*, the rents and profits of his two messuages and lands in *Lyninge* in his own occupation, during the life of his wife, equally to be divided betwixt them, paying five pounds yearly out of the premisses last mentioned to *Ann* his wife for her life, by half-yearly payments, and after his wife's decease to his two daughters *Margaret* and *Hannah*, to hold to them and their heirs, *equally to be divided betwixt them.*

At the end of the deed was a clause, by which he gives the residue of his personal estate, after debts and funeral expences, to his daughters, *to be equally divided* between them (3).

On the 28th of *April* 1714, *George Everinden* died, leaving *Ann* his widow and five children, *viz. Margery* deceased, the plaintiff *Elizabeth* and *Sarah* the mother of the other plaintiffs, the defendant, and *Hannah* the late wife of *John Dixon*, both deceased, which *Margaret* and *Hannah*, on their father's death, entered on the premisses granted to them, and paid the five

(1) *Reg. Lib.* B. 1750. fol. 279.

(2) *Goodtitle* v. *Stokes* 1 *Wils.* 341. *Vide* Mr. *Cox's* note to *Fisher* v. *Wigg*, 1 *P. W.* 14.

(3) Not in the Register's book tho' probably in the deed-poll.

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pounds a year to their mother till her death, which happened the 9th of *September*, 1719. RIGDEN v. VALLIER.

Hanah died the 10th of *April* 1728, leaving one son, *Richard Dixon* an infant; and the defendant *Margaret*, who married afterwards *William Vallier*, and continued in possession from the death of her sister *Hannah*, and accounted for a moiety of the rents and profits to *John Dixon* to the time of the death of his son *Richard*, which happened on the fifth of *February* 1730. [732]

On his death the plaintiffs and the defendant were his heirs at law, and also heirs of *Hannah*, by the custom of gavelkind; *Margery* the other daughter being dead without issue, and *John Dixon* the father of *Richard* having after the decease of *Hannah* married another wife, and thereby, according to the custom of gavelkind, forfeited his estate as tenant by the curtesy, the plaintiffs and defendant became intitled to *Hannah*'s moiety of the premisses; and the rents and profits thereof; but the defendant has ever since *Hannah*'s death been, and now is, in possession of the whole, being twenty pounds *per ann* and not only received the rents, but cut down and sold the timber, and has the title-deeds in her possession.

The defendant insists, that the premisses were given by her father under *the deed-poll*, to hold to her and her sister as joint-tenants, and not as tenants in common; and that she by surviving her sister is become intitled to the whole, and refuses to account for the rents or timber, or to produce *the deed-poll* or title-deeds.

But the plaintiffs insist, that the deed poll being a grant to them and their heirs for ever, *equally to be divided between them*, and operating as a covenant to stand seised, they were tenants in common, and not jointenants; and *Hannah*'s moiety did not survive to the defendant, but descended to her son, of which she herself was so sensible, that on *Hannah*'s death she accounted for a moiety of the rents to *John Dixon* for the use of his son till his death, but now absolutely refuses to account.

The bill therefore is brought for an account of the rents of the premisses and money raised by sale of timber, and that the plaintiffs may be paid their proportions, and that the title deeds may be brought into court, or otherwise secured for the persons interested.

LORD CHANCELLOR,

The question in this case is, whether the limitations in the deed-poll of the 5th of *August* 1710, executed by *George*, are a jointenancy, or a tenancy in common.

The deed begins as a deed-poll, but is in fact a disposition of his real and personal estate, and to take effect after his death.

This may be good as a covenant to stand seised; but if it was to be considered as a conveyance it would not be good, because there is no transmutation of possession. [733]

The present point is a very litigated one in the books.

RIGDEN v. VALLIER.

The word *equally* only will make a tenancy in common in a will.

Equally to be divided is now established to be a tenancy in common in a will, or if it was *equally* only, without the subsequent words annexed to it would be so construed (1).

But then it is insisted to be otherwise in the case of a deed; and though I do not find any solemn determination of this sort, yet the distinction to be sure is often made in the books.

In the case of *Fisher* versus *Wigg*, in 1 *P. W.* 14. and 1 Lord *Raym.* 622. there was a surrender of a copyhold estate to the use of *A. B.* and *C.* and their heirs, *equally to be divided betwixt them and their heirs respectively*. This was held by Mr. Justice *Gould* and *Turton* a tenancy in common, by reason of the apparent intent of the surrender, against the opinion of Lord Chief Justice *Holt* who thought it a jointenancy.

I do not find that this judgment has been reversed, so that it is undoubtedly an authority.

The case in 2 *Vent.* 367. in Chancery, is also to the same purpose, where a covenant to stand seised to the use of *A.* for life, and afterwards to two *equally to be divided*, and their heirs and assigns for ever, was adjudged by the Lord Keeper *North* to be a tenancy in common.

I have had the register searched for this case, and cannot find it; but notwithstanding it was not entered, it might have been so determined, and is so cited by Mr. Justice *Turton* in *Fisher* versus *Wigg*.

Hammerton versus *Clayter*, 14 *Car.* 2. *Rot.* 43. was adjudged a tenancy in common upon the same words; but this case is not much to be depended upon, because at the end of Lord *Raymond's* report of *Fisher* versus *Wigg* it is said to be cited by Sir *Edward Northey* only, and the case was not to be found.

In the case of *Smith* versus *Johnson*, *Pasch.* 32 *Car* 2. (2). in the court of King's Bench, there was a feoffment to two and their heirs, *equally to be divided between them, to the use of them and their heirs*: upon the breaking of the case, *Scroggs* Chief Justice, and *Dolben* Justice, were of opinion that it was a tenancy in common; but *Jones* Justice was of another opinion, upon the difference between a deed and a will.

[724] But notwithstanding there was a rule in that case for judgment *nisi*, yet nobody being satisfied with the opinion, the rule was upon motion set aside, and it was made an *ulterius concilium*, and ended afterwards by the death of the parties.

In the present case I think it a tenancy in common, whether the instrument be considered as a deed, or a will.

The arguments of Mr. Justice *Gould* and *Turton*, in the case of *Fisher* and *Wigg*, are more agreeable to the reason of the thing, and Lord Chief Justice *Holt's* more subtle.

No person has more reverence for the arguments of Lord Chief Justice *Holt* than I have; but in *Fisher* and *Wigg* the arguments of the other two judges are more agreeable to the reason of the thing, and his more subtle and finely spun.

(1) So *P*[illegible] v. *Heslin*, *ante* 1 vol. 493. *Vef.* 165. note 1. *O*[illegible] v. *O*[illegible], 1 *Atk.* 494 *Hawes* v. *Hawes*, *ante* 545. *Stones* v. *Heurtly*, 1

(2) S. C. 1 *P W.* 16. cited.

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That was a question upon a copyhold estate, and there Mr. Justice *Gould* and Mr. Justice *Turton* held it ought for that reason to be construed favourably, and contrary to the rules concerning conveyances at common law; and that they are to be considered as wills, because the surrender is oftentimes made by the surrenderer *in extremis*, when he is *inops consilii*: but Lord Chief Justice *Holt* was of opinion, as to raising and passing estates, copyholds ought to be governed by the rules of the common law, and that a surrender to uses is only a direction, and the surrenderee is in by the grant of the lord, and not within the statute of Uses; and therefore held the case was to be considered as a grant at common law.

RIGDEN v. VALLIER. As surrenders of copyhold estate are often made by the surrenderer *in extremis*, and when he is *inops consilii*, they are to be considered as wills and construed favourably.

Here I must consider it as *a covenant to stand seised*, for there is no livery, and is to take effect after his decease, which could not be good, as a conveyance of a freehold, to take effect *in futuro*.

It would be very inconvenient to construe a covenant to stand seised, different from conveyances at common law.

But here there are words of regulation, or modification; and I do not see any harm in giving them a reasonable construction to answer the intention.

There are other reasons which weigh with me, and greatly strengthen my opinion. Here is a father making provision for all his children: suppose one of them had died and left children, if a joint-tenancy, it must have gone from them and survived to the other sons and daughters of the grantor, which could never be his intention.

This court has taken a latitude upon the foot of intention; if two persons advance money upon a mortgage, though the conveyance be made to them jointly, it shall be a tenancy in common (1).

If two persons advance money upon a mortgage, though the conveyance be made to them jointly, it shall be a tenancy in common.

[735]

In the case of advancing money jointly by two persons for a purchase, it has been said indeed that the chance is included, and the interest shall survive (2), but then it must be understood where two persons purchasing, advance in moieties, for if there is a disproportion in the sums it would be otherwise.

The grantor seems to have put his own construction upon this deed by disposing of his personal estate in the same words and which is admitted to be a tenancy in common, and therefore it would be extraordinary to say he meant differently in one from the other.

This is as near a testamentary case as can be, and I do not see but it might have been proved as a will. the case of *Kibbet* versus *Lea* was on a deed, and yet proved; and since that determination there has been another of the name of *Jukson* and *Trimmer*, in the court of King's Bench, about a year ago.

The case here so near a testamentary one, it might have been proved as a will (3).

(1) So *Petty* v. *Styward*, 1 *Cha. Rep.* 57. *Caddick*, 3 *P. W.* 158. *Partridge* v. *Pawlet*, ante 1 vol. 467.

(2) *Vide Hayes* v. *Kingdome*, 1 *Vern.* 33. *Usher* v. *Aylesworth*, *ibid.* 361. *Lake* v

(3) So *Hixon* v. *Wytham*, 1 *Ca.* 248.

RIGDEN v. VALLIER.

The word *grant* must be construed, as the words bequeath or devise in a will, for this is *quasi* a testamentary act, and therefore must be considered as a will.

No objection to this construction arises from the word *grant*; for a grant must be construed equally the same with the words *devise* or *bequeath*, if in a will; and this is *quasi* a testamentary act and therefore must be considered as a will.

When the estate in question is of small value, instead of sending it to be determined by a whole court, it may be directed to be heard and argued before two judges at their chambers.

Notwithstanding this is my opinion, yet if the defendant chuses to have the question determined by common law judges, I will give him an opportunity of doing it; but as the estate in question is of so small a value, I will not send it to be determined by a whole court, because the present method (though a right one) of setting down such cases in their special paper of causes, introduces a number of arguments, and a considerable expence; but I will direct it to be heard and argued, as is often done, before two judges only at their chambers: and mentioned Lord Chief Baron *Parker*, and Mr. Justice *Burnet*.

Mr. Attorney General, who was counsel for the defendant, declaring himself well satisfied with Lord Chancellor's opinion, he made a decree according to the prayer of the bill, but at the same time said he would direct the account of the rents and profits to be carried back only one year before the filing of the bill, as it was not filed till nineteen years after the death of *Hannah*, *viz.* the twenty-eighth of *November* 1749.

Case 282. [736]

July 23, 1751, *Edmund Robinson, an Infant, by his next Friend,* Plaintiff.

William Robinson, Clerk, and others, ——— Defendants.

S. C. 2 Burr 38. S. C. 2 Vel. 225. On a case made by order of Lord *Hardwicke* for the opinion of the judges of the court of King's Bench, they held that *L. H.* must by necessary implication, to effectuate the manifest intent of the testator, be construed to have taken an estate in tail male, notwithstanding the express estate devised to *L. H.* for his life, and no longer.

UPON the 27th of *July* 1723, *George Robinson*, of *Boebym* in the county of *Cornwall*, Esq; makes his will, attested by three witnesses, and after giving to his wife one guinea, and to his father-in-law a groat, he gives and devises in the words following;

" I give and devise all my real estate wheresoever to *John* " *Hill*, *Thomas Lukey*, and *Sampson Sandys*, and their heirs, to " the uses following;" (here the testator directs them to raise a thousand pounds for a particular purpose, and then goes on, and says, " My will is, and I bequeath all my said real estate, " excepting my estate at *Endyllion*, and all my presentations in " the said county, to *Lancelot Hicks*, of *Plymouth* in the county " of *Devon*, Gentleman, for and during the term of his natural " life and no longer, provided he alter his name and take that of " *Robinson*, and live at my house of *Boebym*; and after his decease

" to

ROBINSON v. ROBINSON.

" *to such son* as he shall have lawfully to be begotten, taking the " name of *Robinson*; and for default of *such issue*, then I bequeath " the same to my cousin (the defendant) *William Robinson* of " *Landewedrick*, and his heirs for ever: and after several lega- " cies, the testator gave all the rest of his goods and chattels, " together with his said estate at *Endyllion*, to the said *William* " *Robinson*; and made him sole executor of his will."

On the 30th of *September* 1728, the testator died without issue, leaving the defendant *William Robinson* his heir at law, and *Lancelot Hicks* did after the testator's death take upon him the name of *Robinson*.

Lancelot Hicks had two sons, *George* his eldest son, and the plaintiff *Edmund* his younger son; and *George* was called by the name of *Robinson* and died in *March* 1738 an infant, in the life-time of *Lancelot Hicks* his father and of the plaintiff his younger brother.

In *July* 1745 *Lancelot Hicks* died, leaving the plaintiff *Edmund Hicks*, alias *Robinson*, his only surviving son.

The plaintiff brought his bill in the court of Chancery for the execution of the trusts in the said testator's will, and that a sufficient part of the real estate might be sold to discharge the debts [737] and incumbrances affecting the some, and that the residue of the said estate might be conveyed to the plaintiff.

The defendant *William Robinson* by his answer insisted, that by the testator's will *George Hicks*, alias *Robinson*, the elder brother of the plaintiff, was tenant for life in remainder of the testator's estates immediately expectant on the estate devised to his father, and that such estate was a vested remainder in him, and that no other son of *Lancelot Hicks* could under the testator's will take an estate or interest in the lands thereby devised; and that on the death of such son the defendant as heir at law of the testator, or by virtue of his will, became seised in fee of the reversion of the estates of the testator immediately expectant on the estate devised for life to *Lancelot Hicks*, and that on his death the defendant became seised in possession thereof, subject to the charges and incumbrances thereon.

Lord Chancellor gave his opinion in this cause the 23d of *July* 1751.

The question is, Whether the plaintiff *Edmund Robinson* took any estate under the will of *George Robinson*.

I can find no place where the word *son* has been construed to give an estate-tail in the first taker, but in the case of *Byfield* in the time of Queen *Elizabeth*, cited by Lord Chief Justice *Hale* in the cause of *King* versus *Melling* (1).

Byfield's case in Queen *Elizabeth's* time the only one where the word *son* has been construed to give an estate-tail in the first taker.

I do not know what weight to give to this case, because though I have looked into *Cro. Eliz.* and all the cotemporary reporters,

Byfield's case is not to be found in *Cro. Eliz.* or any of the cotemporary reporters, and therefore cannot be allowed to be an authority. The devise in the present case being to *L. H.* for life, and no longer, cannot by any implication whatsoever be construed to be an estate-tail in him.

(1) 1 *Vent.* 214, 225. S. C.

yet

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yet I cannot find it reported, and notwithstanding it was mentioned by Lord Chief Justice *Eyre*, in the case of *Dubber* versus *Trollop* (1), yet he states it from the case of *King* versus *Melling*, and so does every one who cites it in any case subsequent to *King* and *Melling*, and therefore it is probable *Hale* quoted it from a manuscript, and upon such an authority as this is, I cannot justify it to myself to construe the word *son* to give an estate-tail in the case before me, because the devise to *Lancelot Hicks* is to him for life, and no longer, and consequently by no implication whatsoever can this be construed to be an estate-tail in him.

But I do not intend to given an absolute opinion; and if the parties approve of it, I will make a case for the judgment of the court of King's Bench.

[738]

The direction to alter the name of Hicks, and take that of Robinson, means bearing the name of Robinson, and therefore could not desert it, as he might have done if it had been taking only; but still it is a condition subsequent only, and did not divest the estate.

The direction to alter the name of *Hicks*, and take that of *Robinson*, means bearing the name of *Robinson*, and therefore could not desert it, as he might have done if it had been taking only; but still I think this was a condition subsequent and did not divest the estate, and the son who was but just born would have a reasonable time to take the name.

Lord Chancellor said, after mentioning the case of *King* versus *Melling* in *Ventr. Reports*, that the argument of Lord Chief Justice *Hale* in *Ventris* was not copied from his own argument, but the arguments in the case of the *Seven Hundreds of Cirencester*, and a case upon alienations, were copied verbatim from a manuscript of *Hale*.

Upon the 9th of *November* 1751, the cause came on again before *Lord Chancellor*, when his Lordship ordered that a case should be made for the opinion of the Judges of the court of King's Bench upon the will of the testator *George Robinson*; and the material facts appearing in the pleadings upon the following question:

Whether any and what estate or interest in the premisses in question is, by virtue of the said will, vested in the plaintiff *Edmund Robinson* the infant: and it was ordered that the said case should be stated as of a devise of a legal estate to *Lancelot Hicks*, and the several persons to take in remainder after him, without regard to any trusts.

N. B. The above question has been under the consideration of the court of Chancery in another cause, which was as follows:

Upon the death of *George Robinson*, his widow brought a bill in Chancery against *William Robinson* his heir at law, and *Lancelot Robinson* his devisee, and to have a performance of the articles made upon her marriage; and a cross bill was brought by the said *Lancelot Robinson* to prove his will, and to have an execution of the trusts thereof.

(1) 8 *Vin.* 233. S. C. *Robinson's Gavel.* 96. S. C.

Upon

Upon hearing the causes before Sir *Joseph Jekyll*, on the 17th of *April* 1733, the following remarkable declaration was inserted in the decree: "His Honor declared that by the said "testator's will the defendant *Lancelot Robinson* is intitled to "an estate for life in all the estates of the said *George Robinson*, "except the estate of *Endyllion*, with remainder *to the eldest son*, "*and but one son*, of the defendant *Lancelot Robinson* for his life "they performing the condition in the said will; *and that the re*-"*mainder will go over to the defendant* William Robinson *the heir* "*at law of the said testator*."

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Sir *Joseph Jekyll*, in a cause between the widow of the testator and *W. R.* the heir at law, declared that *L. R.* was intitled only to an estate for life, with remainder *to the eldest son, and but one son for his life*, and that the remainder will go over to *W. R.* the heir at law of the testator.

A copy of the opinion of the judges of the court of King's Bench in the case of Robinson *against* Robinson, *the 1st of December* 1756.

[739]

We are of opinion, that, upon the true construction of the will of *George Robinson*, *Lancelot Hicks*, therein mentioned, must by necessary implication, to effectuate the manifest general intent of the testator, be construed to have taken an estate in tail male, he and the heirs male of his body taking the name of *Robinson*, notwithstanding the express estate devised to the said *Lancelot* for his life and no longer (1).

Mansfield
J. Denison.
M. Foster
J. E. Wilmot.

(1) *Vide Bamfield* v. *Popham*, 1 *P. W.* 54. *Allanson* v. *Clitherow*, 1 *Vesf.* 24. *Wyld* v. *Lewis*, *ante* 1 vol. 432. *Lethieullier* v. *Tracy*, *post* 784. *Vaughan* v. *Farrier*, 2 *Vesf.* 182. *Evans* v. *Astley*, 3 *Burr.* 1570. *Hay* v. the Earl of *Coventry*, 3 *Term Rep.* 83. *Doe* v. *Applin*, 4 *Term Rep.* 82.

Burden versus *Kennedy*, *July* 23, 1757. Case 283.

LORD CHANCELLOR,

WHERE an execution by *elegit* or *fieri facias* is lodged in a sheriff's hands, it binds goods from that time, except in the case of the crown, and a leasehold estate is also affected from that time; and if the debtor subsequent to this makes an assignment of the leasehold estate, the judgment creditor need not bring a suit in ejectment, to come at the leasehold estate, by setting aside the assignment, but may proceed at law to sell the term, and the vendee, who is generally a friend of the plaintiff, will be intitled at law to the possession, notwithstanding such assignment.

A leasehold estate is affected by an *elegit* or *fieri facias* from the time it is lodged in a sheriff's hands; and if the debtor subsequent to this makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be intitled to the possession, notwithstanding such assignment.

But

BURDON v. KENNEDY.

But in the present case here is only an equity of redemption in the debtor in the leasehold estate, and an execution lodged will not affect this, as the legal estate is in the mortgagee; and consequently, by the common equity of this court, he may come here to redeem a subsequent incumbrancer, and likewise to discover whether there was any and what consideration for the assignment.

Case 284.

[740]

Butler versus *Rushfield*, *August* 2, 1751.

If there be a sequestration *nisi*, for want of an answer, against a member of parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to the answer, the court *will enlarge the time for shewing cause till it appear* whether the answer is sufficient.

MR. *Evans* shewed cause why an order *nisi* for a sequestration, for want of an answer from a member of the House of Commons, should not be made absolute.

The cause shewn was, an answer come in; but it was insisted on the part of the plaintiff, as exceptions were taken, that it is no answer, and therefore the order ought to be made absolute. Mr. *Evans*, *e contra*, cited Lord *Clifford*'s case, 2 *P. Wms.* 385. where it is laid down by Sir *Joseph Jekyll*, that if there be a sequestration *nisi* against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for sequestration shall not be absolute, but a new sequestration *nisi*, and at the same time Mr. *Goldsborough*, who was then the register, said this was the course of the court.

LORD CHANCELLOR,

If there be a sequestration *nisi* for want of an answer against a member of parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to this answer, the court *will enlarge the time for shewing cause* till it shall appear whether the answer is sufficient or not.

Mr. *Goldsborough*, who said it was the standing rule of the court there should be a new sequestration *nisi* in this case, was a very good officer, but yet I should think what I have mentioned is the proper medium: but his Lordship at present allowed the cause, as it was the course of the court.

Case 285.

T[illegible] versus *Owen*, *August* 3, 1751.

S. C. Amb 109. The wife and executrix of an attorney brought a bill for money due to her, for business done by her husband as the defendant's attorney. A demurrer to the relief as a remedy is *at law* under the statute of [illegible] *for the better regulation of attorneys and solicitors.* Lord Chancellor allowed the demurrer.

A Bill brought by the executrix of an attorney, for money due from the defendant for business done by her husband as his attorney, and to be paid what shall be found due on an account, and states the delivery of a bill by the plaintiff.

The

The defendant demurred to the relief; and for cause of demurrer shewed, the remedy was at law, and that an act of parliament has pointed out a summary way; the statute of 2 *Geo.* 2. *cap.* 23. *sect.* 22.

Lord Chancellor allowed the demurrer (1).

(1) *Reg. Lib.* B. 1750. fol. 502.

Parsons versus *Freeman*, *November* 9, 1751.

Case 286.

[741]

S.C. 1 Wilf. 308.
S.C. Amb. 116.

On a husband's promising to do acts for a wife's benefit, she, in articles before marriage, covenanted to join in suffering a recovery of her estate, and settle it to him and his heirs.

ON articles before the marriage of *Richard Freeman* and his wife, upon his undertaking to do some acts for her benefit, she covenanted that she would join with him in suffering a recovery of an estate that belonged to her, and settle it to him and his heirs.

The husband made his will, and devised this estate to the defendant, but not having done what he obliged himself to do, came to a new agreement with his wife, that he shall not take her estate *instanter* in fee, but subject to an appointment of the husband and wife, and in default thereof, to the use of the husband and his heirs.

Mr. *Freeman* made his will in 1729, and took upon him to devise this estate to the defendant; but not having performed the contract, or the acts he had obliged himself to do by the articles, *Freeman* afterwards comes to a new agreement with his wife, that he shall not take her estate *instanter* in fee, but subject to an appointment *of the husband and wife*, and in default of such appointment, to the use of *Richard Freeman* and his heirs.

The recovery suffered, the uses declared to the purposes of this deed: he died in the wife's life-time, without making any appointment, or revoking his will.

A recovery was suffered by Mr. *Freeman* and his wife, and the uses of that recovery declared to be to the purposes of the deed; he died afterwards, in the life-time of his wife, without ever making any appointment with her, or revoking his will.

The recovery suffered by Mr. *Freeman* and his wife, and the declaration of it, to the uses of the deed, a revocation of Mr. *Freeman*'s will.

The question was, Whether the recovery suffered by *Richard Freeman* and his wife, and the uses of that recovery as declared by them, are a revocation of his will.

Mr. *Noel* for the plaintiff insisted, that the recovery is clearly a revocation as to this estate.

There are two general rules:

First, Where a man has an estate in fee at the time of making his will, and makes a feoffment afterwards, though he takes an estate to himself in fee again, it is a revocation.

Secondly, Where what is done, relates and extends to the whole estate, it will be considered the same in equity as at law.

And

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And for theſe purpoſes, he cited *Marwood* verſus *Turner*, 3 *Wms*. 163. there "tenant in tail-male, remainder to himſelf "in fee, deviſes his lands to *J. S.* and then ſuffers a recovery [742] "to the uſe of himſelf in fee, and dies without iſſue male; this "is a revocation of the will (1)."

This determination ſhews, that the principle I have laid down is fully eſtabliſhed, with regard to ſubſequent acts after making a will.

Though a will, I muſt allow, takes in all perſonal eſtate acquired afterwards, yet in cannot poſſibly take in a real eſtate acquired afterwards.

It is laid down in *Rolls Abr*. 616. that a feoffment after a will, though declared to the uſes of a will, is a revocation.

The deed to lead the uſes of the recovery amounted to a new agreement; for, inſtead of letting it reſt as it did on the articles, the huſband and wife conveyed the eſtate in fee upon a different conſideration.

In the caſe of *Pollen* verſus *Huband*, *Eq. Caſ. Abr*. 412. Sir *J. H.* by will of the 12th of *February*, 1708, "gives all the reſidue of his real and perſonal eſtate to *J. P.* and the heirs males "of his body, with remainders over; afterwards, by leaſe and re-"leaſe, the 30th of *Auguſt*, 1709, Sir *J. H.* together with *J. S.* his "truſtee, convey ſeveral lands in *Warwickſhire* to truſtees and "their heirs, to the uſe of himſelf for life; and that the truſtees "ſhould execute ſuch conveyance thereof as Sir *J. S.* by writing "under his hand and ſeal, or by his laſt will and teſtament ſhould "appoint: Sir *J. S.* died in 1710, without altering or revoking the "ſaid will, or making any other appointment touching the real "eſtate: the queſtion was, Whether this leaſe and releaſe were a "revocation of the will or not; and it was decreed, *that the leaſe "and releaſe were a revocation of the will.*"

There was a caſe of *Tickner* verſus *Tickner*, before Lord Chief Juſtice *Lee*, about a year ago, which was as follows:

"*Robert Tickner*, ſeiſed in fee of the eſtate in queſtion of "gavelkind, died inteſtate, and left two ſons, *Henry* and *Robert*, "who entered on his death, and became ſeiſed in gavel-"kind; *Robert*, being poſſeſſed of an undivided moiety, made "his will, and deviſed it to his wife *Elizabeth Tickner* and her "heirs."

"After making his will, by a deed of partition between *Ro-"bert* and *Henry Tickner*, and by a fine, all the gavelkind eſtate "which *Robert* had deviſed, was allotted intirely to *Robert*, to "ſuch uſes as he ſhould appoint by deed or writing, and in de-"fault of ſuch appointment, to him in fee.

[743] "A verdict was found in ejectment, ſubject to the opinion "of Lord Chief Juſtice *Lee*, who, after mature deliberation, held "this tranſaction to be a revocation of the will (2)."

(1) *Poſt* 803.
(2) *Swift* v. *Roberts*, *Amb*. 617. But ſee *Luther* v. *Kirby*, 8 *Vin*. 148 *pl* 30.

Mr. *Wilbraham*, counsel of the same side.

Though there had been no express agreement, yet, the acts done amount to a new agreement.

The consequence of the recovery is, they have connected their legal and equitable estates together, and conveyed them by the deed, to make a tenant to the *præcipe*.

It is laid down in *Moor* 107, that if a use is declared by an indenture, yet the parties may alter the indenture, at any time, till the estate is executed by the fine, and the second deed shall controul the first.

In *Jones* versus *Morley*, *Salk*. 677. it was resolved, "that "if a fine had been levied pursuant to a covenant in a marriage-"agreement, no parol averment could have been allowed to de-"clare other uses, or that the fine was not to the uses of that "deed, and all parties had been estopped to aver the contrary by "parol; but by deed subsequent, and before the fine, other "uses may be averred, though they were declared by writing and "not by deed; for, by the variance there was room to inquire "and receive information, that the old agreement was relin-"quished."

"That this is a good revocation of the uses of the first deed, though "it be but a writing; for where the conveyance enures by way "of transmutation, the use is according to the intent of the party, "and it is no matter how that intent is manifested, so as it may "be known."

He cited likewise the case of *Stapleton* versus *Stapleton*, (1 *Tr. Atk*. 2.)

Till uses are declared, and whilst it lay in suspence, whether Mr. and Mrs. *Freeman* would jointly declare uses or not, it vested in Mrs. *Freeman*, as being her estate.

Suppose the estate had been limited to the husband in tail, with such a power of appointment, till appointment, the fee cannot be in abeyance, and therefore must revert back to the person, who had the original dominion over this estate.

Therefore, if it is a resulting use, it would come to Mrs. *Freeman*, and must be a declared new use to come to him, and if so, it is an acquired estate, and consequently a revocation of the will, as he gained a better estate than he had before. [744]

Mr. *Evans* also counsel of the same side.

Either by having gained a new estate upon a new use executed to the husband, or on a solemn act by the husband and wife, it is a revocation.

The reason why, in the rule already laid down, a second deed will revoke the first, is, because it rests in agreement only, till the fine levied, or recovery suffered.

The wife, who was tenant in tail, with remainder to her nephew, covenants by marriage-articles to limit a part of her estate to the husband in fee, on his doing what he agreed on his part to complete the articles.

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He not having performed his contract, they come to a new agreement, that he should not take the estate *instanter* in fee, but subject to the appointment both of husband and wife, therefore the recovery suffered was not intended to complete the articles, but upon a different consideration.

The fee, vested in Mr. *Freeman* under the deed, was upon a new use executed, and not a use contracted for by the articles, but variant from what is devised by him; but if the court should not be of opinion it is a new use, yet still the very act of suffering a recovery, shall be considered as an intention in Mr. *Freeman* to revoke his will.

It is material, this is not such an use, only as he shall appoint, but such uses as the husband with his wife shall appoint.

Upon the whole, it is manifestly done with an intention to depart from the articles, and not in conformity to them.

The Attorney General, for the devisee under the will, said, the true question was, Whether the recovery suffered by Mr. and Mrs. *Freeman* after the marriage-articles is a total, or a partial revocation of the devise made by Mr. *Freeman*'s will.

Mrs. *Freeman*, at the time of the marriage, was seised in tail of one part of the estate in question, in fee of another.

It is necessary to consider what estate it was Mr. *Freeman* had before the will, and what he intended to pass by the will.

[745] He had only the trust of an estate in fee, and under the will has devised nothing more but that trust in fee.

The operation of the recovery is that it conveys the legal estate, and bars the estate-tail Mrs *Freeman* had, the use is disposed of, and the inheritance disposed of by the limitation to the husband and wife, and their appointments, therefore the fee cannot be said to be *in abeyance*.

The second question will be, What operation the recovery has in equity, and what is the consequence with respect to the equitable interest?

Though the legal use, till appointment may be said to vest in the wife, yet the equitable use vests in the husband, then the recovery will operate only, so as to leave the husband such estate as he had before.

Where a person makes a will, and afterwards a subsequent conveyance, so far as it is consistent with the will, it is no revocation; so far as it is inconsistent, it is.

He cited *Coward* and *Marshal Cro. Eliz.* 721. "Where a "man devised lands to his younger son and his heirs, and af- "terwards took a wife, and by another will in writing, he, de- "vised the lands to his wife for life, paying yearly to his son, "and his heirs, such a rent, held to be no revocation, but in "this case *both wills may stand together*, unless the latter be con-

"trary to the first will, or that there be an express revocation; "and here his intention appears to be only to provide for his "wife, whom he afterwards espoused, and not to alter the will "as to his son."

Lord Chancellor said, the subsequent act appeared to be only a codicil, and does not come up to the present case, the codicil being part of the will.

All the cases cited were mere legal questions; as the estates in every one of them were legal estates.

The case of *Tickner* versus *Tickner* wa sa new conveyance, and did not rest upon the partition only.

Mr. *Solicitor General* of the same side.

A general rule is to be drawn from the cases, that there is a sort of revocation which does not depend on the intention of the testator.

As where a man only takes back the very estate he devised by a new conveyance, and yet is held to be a revocation. [746]

The converting an equitable into a legal fee, is not within this rule, but depends upon other considerations, and the present is a case of this sort.

The reason why a person who first made a will, and then suffers a recovery to the same uses, is a revocation, depends on artificial reasoning, being considered as a new conveyance.

That the conversion of a legal into an equitable estate or trust, will not be a revocation.

In the case of Lady *Mary Vernon* versus *Jones*, 2 *Vern.* 241. "*A.* devised lands to trustees to pay his debts, and then to pay "his wife 200 *l. per ann.* for her life: the testator lived seve- "ral years, and his debts were increased from 2000 *l.* to 10,000 *l.* "*A.* by deed and fine conveys his lands to the same trustees to sell "to pay his debts, and the surplus to him and his heirs, and his "wife joins in the fine and conveyance: this was determin- "ed to be no revocation of the wife's 200 *l. per ann.*"

In the case of *Ogle* versus *Cook* (1), the 20th of *February* 1748, before your Lordship: "A real estate was devised, and "after the devise it was conveyed to be sold, in order to pay a debt due to Mr. *Coke*, and conveyed to him in fee for that express "purpose, and in trust for himself as to the residue; held to be "no revocation."

This was determined, I apprehend, on the common principle of a person who is seised in fee making a will, and then mortgaging the estate, there in law the whole fee is gone, and yet in equity, a revocation of the will *pro tanto* only.

The case of all other revocations depends upon the implied intention of the testator, and after making a will, no act shall revoke it, but where the act done is inconsistent with his will, and even then, where it is only a partial inconsistency, it is but a revocation *pro tanto*.

(1) 1 *Bro. Cha. Rep.* 501. S. C. 2 *Bro. Cha. Rep.* 592. S. C.

When

Barton v. Freeman.

When a man, after making a will, demises to the same person for 40 years, this is a revocation *pro tanto* only.

In the case of *Lamb* versus *Packer*, "*A.* by will devised to "his son a messuage of 99 years, if three lives lived so long, pay-"ing his sister 40 *l. per ann.* for her life, and afterwards makes a "lease to *B.* of the same messuage for 99 years, if three lives lived "so long, paying 50 *l per ann.* to the lessor and his heirs; it was [747] "decreed at the *Rolls*, that the lease was a revocation of the de-"vise; but upon appeal to the Lord Keeper, decreed to be *no* "*revocation*, and that the daughter shall be paid her annuity. "2 *Vern.* 495."

At the time of making the will, the testator had no legal estate, but, in the notion of this court, a bare equitable fee.

What is done between the husband and the wife? Nothing but a conveyance of the legal estate.

The bare conveyance of the legal estate will make no alteration as to the will.

It was limited upon the recovery to such uses as the husband and wife shall appoint, and for default of such appointment, the husband has it in fee.

The alteration by the recovery is only *the contingent appointment of uses*, and not inconsistent with the will in any respect.

If Mr. *Freeman* had had a legal estate, it could not have been distinguished from the rule of a recovery's being a new conveyance, but clearly he had only an equitable fee.

It has been said, here was a new agreement, but the consequence does not follow; if it was a partial agreement, it is no revocation; if there had been such an agreement to subject it to this contingent partial revocation by letting in the appointment as to some of his interest, it would have been only a partial revocation; and the equitable fee he had in him is not disturbed by any act the husband has done by the recovery.

But as the appointment was never made by the husband and wife, the recovery is no alteration of the old equitable fee Mr. *Freeman* had in him at the time of making the will.

LORD CHANCELLOR,

The law leans to an heir, and artificial reasoning allowed to prevent his being disinherited.

The cases have been determined on very nice and artificial reasons, upon an inclination the law always shews to favour an heir, and to prevent him from being disinherited, where the intention of the testator is doubtful.

If the husband had been seised of the absolute legal estate at the time of making the will, and afterwards had suffered a recovery, and declared the uses to be such as he and his wife should appoint; this would have been a revocation.

[748] If a person seised in fee, devises an estate in fee to *J. S.* and by a conveyance takes back an estate from *J. S.* in fee, that is a revocation (1).

(1) *Vide Brudenell* v. *Boughton*, *ante* 2 vol. 273. and the cases there cited. So an incomplete conveyance, as a feoffment *without livery*, has been held to be a revocation of a will. *Beard* v. *Beard*, *ante* 73. *Sparrow*, v *Hardcastle*, post 803. *Secus* as to a deed obtained *by fraud* *Hawes* v. *Wyatt*, 3 *Bro. Cha. Rep* 156.

The

PARSONS v. FREEMAN.

The case of the feoffment, where the testator takes back the old use, is a prodigious strong case.

That construction must arise from a presumed intention, that the testator would not have made a new conveyance, without an intention to revoke his will.

But this must be understood with some restrictions and limitations.

Where a common recovery is to a particular purpose, it shall revoke no further than to answer that purpose.

If the conveyance or recovery be for a particular purpose, then it shall revoke no further than to answer that purpose, as where a testator creates an estate for years, or for life, in the lands devised, it shall operate no further (1).

This is the rule of law, but it has been thrown out as a doubt, whether there may not be some difference in equitable estates.

The same conveyance which would be a revocation of a devise of a legal, will be equally a revocation of a devise of an equitable estate.

I am of opinion that the same conveyance which would be a revocation of a devise of a legal, will be equally a revocation of a devise of an equitable estate, and it would be very dangerous to property if it was otherwise.

But still the same rule holds as at law, if for a particular purpose only it shall be understood to be a revocation *pro tanto* only.

Where a conveyance of the whole estate in law is only meant for a security, the revocation shall be *pro tanto* only (2).

In all the cases where it is a conveyance of the whole estate in law, and is only meant for a security, the revocation shall only be for that particular purpose, to let in the incumbrance, for the testator himself has drawn the line, how far the revocation shall go, and his intention is plainly shewn.

By marriage articles, the wife contracts, that on the husband's doing some certain acts, she will convey her estate to him and his heirs.

It has been said Mr. *Freeman* has not done the acts on his part and therefore was not intitled to an equitable estate in the lands; but though this may admit of some niceties, I will take it he had an equitable estate.

Being so seised he made his will, and devised his equitable interest to a person and his heirs.

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Afterwards, he and his wife suffer a recovery, and do not declare the uses to the husband in fee absolutely, but to such uses as he and his wife should appoint.

No appointment was ever made by him and the wife; she survived him, and at his death the fee vested in him and his heirs.

It has been insisted on the part of the plaintiff, that the recovery, and the deed to lead the uses, has, made an alteration n the estate.

(1) *Vide Coke* v. *Bullock*, *Cro. Jac.* 49. *Montague* v. *Jeffries*, 1 *Roll's Ab.* 616. *Wilcox* and *Kent*, *ibid.* 616. *Lamb.* v. *Parker*, 2 *Vern.* 495. *Villiers* v. *Villiers*, *ante* 2 vol. 72. *Stone* v. *Evans*, *ibid.* 87.

(2) So *York* v. *Stone*, 1 *Salk.* 158. *Perkins* v. *Walker*, 1 *Vern.* 97. *Hall* v. *Dunch*, *ibid.* 329, 342, *Rider* v. *Wager*, 2 *P. W.* 334. *Cashorn* v. *Scarfe*, *ante* 1 vol. 606. *Carte* v. *Carte*, *ante*, 179. *Jackson* v. *Parker*, *Amb.* 687. *Contra Thomas* v. *North*, 1 *Cha. Rep.* 153.

PARSONS v. FREEMAN.

Where a man has an equitable interest in fee in an estate, and devises it, and makes a subsequent conveyance of the legal estate to the same uses, it is no revocation.

The question is, as to that part of the articles, where the husband was to have the fee in the wife's estate.

So far I am of opinion with the defendant, that where a man has an equitable interest in fee in an estate, and devises it, and afterwards makes a conveyance of the legal estate to the same uses, this is no revocation (1).

Whether the conveyance is made by feoffment, by lease and release, or by fine and recovery, it makes no alteration, for that is instrumental, provided he takes it on the same limitation he did before.

If a man seised of a legal estate devises it, and afterwards conveys it in trust for a particular purpose, this is no revocation, but that does not prove it to be no revocation in all cases (2).

I am of opinion, it is in this case plain, the husband and wife came to a new agreement; for, *before*, he was to have an absolute inheritance but, by the *recovery*, took the estate subject to the joint appointment, of the husband and wife, and was executed by the declaration of the uses under the common recovery.

It has been said, the estate vested in him till appointment made, and will open, when made, to let in the use of the appointment, and therefore, still he had the same estate as at the time of making the will.

I am of opinion this cannot be maintained.

A man seised in fee of an estate, devises it, and afterwards by deed takes an estate for life, and to a son when born and the heirs of his body, without any trustees to preserve, &c. this is a revocation of the will.

I will put this case. Suppose a man seised in fee of an estate devises this, and afterwards on a settlement, by lease and release takes an estate to himself for life, with a limitation to *a son when born, and the heirs of his body*, without any trustees to preserve contingent remainders, it might be said, this was for a particular purpose to let in a son when born, and did not in the mean time make any alteration of the former estate, but this has been clearly held to be a revocation of the will.

Mr. *Freeman* took a fee differently qualified, conveyed differently, disposable differently, and cannot be said to be only for a particular purpose, and therefore I am of opinion the recovery is a revocation of the will.

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The case of *Tickner* versus *Tickner*, comes very near the present, it was not merely to effectuate a partition, but for another purpose, and therefore Lord Chief Justice *Lee* held, it amounted to a revocation; and I am, for the same reason, of opinion, the recovery here is also a revocation.

(1) *Vide Barker* v. *Zouch*, 1 *Cha. Rep.* 42. *post* 804.

(2) *Sparrow* v. *Hardcastle*, *post* 798. 804. *Arnald.* v. *Arnald*, 1 *Bro. Cha. Rep.* 401.

Pitt versus *Snowden*, *January* 20, 1752. Case 287.

LORD *Hardwicke* said in this cause, that receivers appointed by this court have a power, where they see it necessary, to distrain for rent, and need not apply first to this court for a particular order for that purpose; and that he had often wondered at their doing it, as it gave the tenant an opportunity of conveying his goods off the premises in the mean time, for the court never makes an immediate order for a distress, but allow on such applications a future day for a tenant to pay (1).

A receiver appointed by this court has a power to distrain for rent, and need not apply for a particular order for that purpose, unless there be a doubt who had a legal right to the rent.

If there should be any doubt who had a legal right to the rent, then the receiver, as he must distrain in the name of the person who has that right, would very properly make an application to the court for an order.

(1) *Vide Griffith* v. *Griffith*, 2 *Vef.* 401. *Wynn* v. *Lord Newborough*, *ibid.* 88. *Hughes* v, *Hughes*, 3 *Bro. Cha. Rep.* 87.

Anon. December 18, 1752. Case 288.

A Motion was made for an injunction to stay the building of a house to inoculate for the small pox in *Cold Bath Fields*.

A bill in this court to restrain nuisances extends to such only as are nusances at law, and the fears of mankind though reasonable ones, will not create a nusance.

For the motion the following cases were cited, 2 *Roll. Abr.* 139, 140. *Hawk. Pl. Cro. book* 1. *p.* 199. *ca.* 75. *sect.* 11. 1 *Lut.* 169.

LORD CHANCELLOR,

The application is to be considered in two lights:

First, Whether the thing complained of be a nuisance?

Secondly, If a nuisance, whether of a publick or a private nature?

Now it is not settled, that a house for the reception of inoculated patients is a nuisance. [751]

Upon an indictment of that kind, there hath been lately an acquittal after a trial at *Rye* in the county of *Sussex*.

The notion of a private nuisance is, where it affects only particular persons, as in stopping up ancient lights, *&c.* (1).

It then becomes a public nuisance when it affects many persons, though it may likewise at the same time be of a private nature too, as in the case of a hole in the King's highway, *&c.*

The present nuisance, if any, is a public one.

For it is not confined to the particular property of the plaintiffs, because it is in the nature of terror to diffuse itself in a very extensive manner.

(1) *Vide The East India Company* v. *Vincent*, *ante* 2 vol. 83.

But bills to restrain nuisances must extend to such only as are nuisances at law.

And the fears of mankind, though they may be reasonable ones, will not create a nuisance.

Had it been a nuisance, the proper method of proceeding would have been by information, in the name of the Attorney General.

Upon the circumstances of this case, I am of opinion, I should not be justified in granting the injunction which is now prayed, and therefore must deny the motion (1).

(1) *The Attorney General* v. *The Foundling Hospital*, 4 *Bro. Cha. Rep.* 165.

Case 289. *Garth* versus *Cotton*, *February* 5, 1753.

S. C. 1 Vef. 555, 524, 546.

G tenant for 99 years, if he so long live, without impeachment of waste, except voluntary remainder to trustees to preserve, &c. remainder to his first, &c. sons in tail male, remainder to Sir *J. C.* in fee.

LORD *Hardwicke* having taken time to consider of the case, this day delivered his opinion.

The plaintiff's father was tenant for 99 years, if he should so long live, without impeachment of waste, except voluntary waste, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to Sir *John Cotton* in fee.

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G. before a son born, and Sir *J. C.* agreed to cut down timber upon the estate, and that Sir *J. C.* should not take advantage of its being waste, and the money arising from it to be divided between them.

The tenant for 99 years, and Sir *John Cotton*, before a son was born of the former, agree by articles, (which recite that the plaintiff's father was seised *of an estate for life*, and was indebted by mortgage, &c.) that the plaintiff's father should cut down the timber upon the estate, and that Sir *John Cotton* should not take advantage of its being waste, and that the money arising from it should be divided between them.

Timber cut to the amount of 2000*l.* *G*'s. son born ten years after attained 21, and suffered a recovery of the estate to himself and his heirs.

Timber was cut down to the amount of two thousand pounds, as appeared by the defendant Sir *John Cotton*'s answer; the plaintiff was afterwards born on the 20th of *May*, 1704, ten years after the articles were executed, has since attained his age of twenty-one, and suffered a recovery of the estate to himself and his heirs.

The son intitled to recover satisfaction for so much value of his inheritance as the late Sir *J. C.* received under the agreement, and his executors admitting assets, 1000*l.* with interest at 4*l.* *per cent.* to be computed from the filing of the bill directed to be paid to the plaintiff the son of *G.* by the executors of Sir *J. C.*

The general question is, whether the plaintiff is intitled to satisfaction for so much as Sir *John Cotton* received out of the inheritance of the estate by sale of the timber before the plaintiff came *in esse*, and consequently before he had any estate in the land, and while the remainder to him vested in contingency. It is admitted to be a new question, and the plaintiff can have no remedy at law; but if intitled to any, it must be in equity.

I Several

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Several matters are to be conſidered.

I will mention ſome that are in their nature plain, and others that are more doubtful.

The cutting the timber was a wrong act: Sir *John Cotton* had no preſent right: the inheritance was in him, but ſubject to open, on the father of the plaintiff having iſſue a ſon: the plaintiff's father might have brought treſpaſs, and ought to have done it, upon account of the privity between him and the remainder-man of the inheritance: the articles were between perſons that had not power to do it: there were ſeveral falſe recitals in the articles, as that the plaintiff's father had a freehold eſtate, &c. There cannot be a ſtronger proof of colluſion: both join to injure the remainder-man if the event of his coming *in eſſe* happened before the deſtruction of the timber was completed.

This caſe will depend intirely on the nature of the eſtate there was in the truſtees, and the conſequence reſulting from it.

The four principal things for the conſideration of the court are, [753]

Firſt, The intent and uſe of creating limitations to truſtees to ſupport contingent remainders.

Secondly, What eſtate ſuch truſtees take at law, and what actions they can maintain at law?

Thirdly, What is the nature of ſuch a truſt in equity, and what remedy they have here?

Fourthly, How they are chargeable for a breach of truſt, and how other perſons may be affected by it?

Firſt, Inſerting truſtees to ſupport contingent remainders took its riſe from two great caſes, *Chudleigh's* 1 *Co.* 120. *a.* and *Archer's*, 1 *Co.* 66. *a.* though not brought in uſe till after the uſurpation.

Chudleigh's and *Archer's* caſe gave riſe to the creating truſtees to preſerve contingent remainders.

The defect that called for a remedy was, the want of a veſted eſtate in feoffees to uſes: in *Chudleigh's* caſe, the judges run into refined and ſpeculative reaſoning; one thing the majority of them went on was, that ſuch a right in the feoffees to ſupport the contingent uſes would introduce a perpetuity, if it was not capable of being barred: the law was not then ſettled, but afterwards in *Archer's* caſe, (which is placed firſt in *Coke's Reports*, though ſubſequent) this point was adjuſted; and alſo in the argument of *Pollexfen* it was fully ſtated and allowed in the caſe of *Hales* and *Riſley*.

The want of a veſted eſtate in feoffees to uſes was the defect that called for a remedy.

Secondly, It was formerly a queſtion, whether truſtees took any eſtate at all, except only a right of entry in caſe of a forfeiture; but this was ſoon ſettled in *Cholmeley's* caſe, 2 *Co.* 50. *a.* A leaſe to *A.* for life, remainder to *B.* during the life of *A.* is a good remainder. 41 *Ed.* 3. *Fitz.* title *Waſte* 53. *Duncombe* verſus *Duncombe*, 3 *Lev.* 457. If it is ſo after an eſtate for life, it is much ſtronger after an eſtate for years, as was rightly argued by Lord Chief Juſtice *Lee* in the caſe of *Smith* and *Parkhurſt*, *alias Dormer* verſus *Forteſcue*, 14 *Geo.* 2. *in B. R.* (1). If there

Settled in *Cholmeley's* caſe, that truſtees took an eſtate, doubted till then whether they had any more than a right of entry in caſe of a forfeiture.

(1) *Ante* 135, S. C.

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is a disseisin they must bring the assise, they have an interest in the timber, but not to cut it down; yet they could not sue at law, the owner of the inheritance only could sue; and the statute of *Gloucester*, 6 *Ed.* 1. *ch.* 5. gives the writ of waste to the same persons.

Thirdly, It is right to construe it in the most liberal manner: woods and mines are part of the inheritance, and the destruction of the former, and exhausting the latter, might take away the best part of the inheritance. The question is, what remedy the

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trustees may pursue in this court? The present trustees are not only enabled to make entries, &c. as is usual, but *to do all and every other lawful act and acts*, and they may take all remedies in law and equity.

The trustees might have had an injunction to stay waste before the contingent remainder man came *in esse*.

I am clear they might have had an injunction to stay waste before the contingent remainder man came *in esse*; vide *Day'ell* versus *Champness*, *Eq. Caf. Abr.* 400. The books go still further: A bill may be brought in behalf of an infant *in ventre sa mere* to stay waste. 2 *Vern.* 711. The trustees in this case might have done it: suppose they had, and an injunction had been granted, and afterwards the timber had been felled, it had been a contempt of the court. On what terms should the parties offending have been discharged? This court would not have fined them, but they could have cleared the contempt only on the terms of making satisfaction, and that might have been by paying the value of the timber. To whom should it have been paid? Not to the tenant for years, he could have no right; nor to *the remote remainder-man*; but it should have been laid up for the contingent uses; for without directing this, complete justice could not have been done.

Trustees to preserve continent remainders may be guilty of a breach of trust, and are punishable for it.

Fourthly, Notwithstanding what is said in *Pollexfen* 250. the Duke of *Norfolk*'s case at the end, that trustees for preserving contingent remainders are not punishable in equity though they break their trusts, yet that observation was not attended to by Lord Chancellor *Harcourt* in the case of *Pye* versus *George*, *Salk*, 680. *Michaelmas Term* 1709, and in the case of *Piggot* versus *Piggot* in the same term, and also in the case of *Mansell* versus *Mansell*, 2 *P. Wms.* 610. it was held they might be guilty of a breach of trust; and it was also settled that a voluntary grantee under the trustee, *without notice*, would be liable to the trusts. Suppose the trustees in this case had consented to the felling and the sale of the timber, and had covenanted not to bring a bill for an injunction to stay waste, they would have been liable. The words of Lord *King* (who was not disposed to extend the power of this court) in the case of *Mansell* versus *Mansell*, are remarkable: "Should the court (he said) hold it no breach "of trust, or pass it by with impunity, it would be making "proclamation, that the trustees in all the great settlements in "*England* were at liberty to destroy what they had been "intrusted only to preserve." But in this case the trustees have not acted; that will excuse them, if they had not notice.

In

In all alienations by trustees the alienee is not affected by the act of the trustee, but by notice of the trust. All the parties here claim under the will of , and it is recited in the articles. It would be strange to say the plaintiff's father and Sir *John Cotton* would have been liable if the trustees had joined, and yet are not so now. Suppose the trustees had joined in the sale of the estate to a purchaser with notice of the trust, and mines had been opened and exhausted, and afterwards a son had been born, according to the case of *Mansell* versus *Mansell*, this court would have decreed a reconveyance of the estate, and their decree would not have been complete without giving a satisfaction for what had been taken away.

GARTH v. COTTON. An alienee is not affected by the act of the trustee, but by notice of the trust.

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There have been several objections raised.

First, That the interposition of the trustees to preserve contingent remainders will not alter the legal right of the tenant for life, and the remainder-man of the inheritance, but it is demonstrable it was designed to abridge the legal rights of the tenant for life to destroy, &c. by forfeiture, and the legal rights of the latter to accept by surrender. It is true the first owner of the inheritance *in esse* shall have timber blown down, *Lewis Bowle's* case, 11 *Co.* 79. *b.* and *Aleyn* 81. an estate in contingency is no estate, and the trees must become the property of somebody, and therefore the first remainder-man of the inheritance in being takes them —but in the present case there is contrivance and collusion contrary to conscience.

The first owner of the inheritance shall have timber blown down, for the trees must become the property of somebody (1).

The second objection, That there is no remedy at law: but this case depends on principles of equity, that is, the point of fraud and collusion, which establishes the authority of this court often contrary to and beyond the rules of law, consider how this determination coincides with resolutions at law.

The point of fraud and collusion establishes the authority of this court often contrary to and beyond the rules of the law.

There is a distinction at law between estates that go over, which arise by operation of law, and by limitation of the party, the former may go back and open, the latter not.

An action of trover lies by the remainder-man for the trees. If there be tenant for life, remainder for life, remainder in fee; if tenant for life commits waste in trees, and afterwards he in remainder for life dies, the remainder-man in fee may bring action of waste. *Paget's* case, 5 *Co.* 76 *b.* The common law has intended a remedy in case of waste, which may be by a person where the estate was out of him by wrong, and afterwards revested in him. *Co. Litt* 356. *a.*

Tenant for life, remainder for life, remainder in fee, if tenant for life commits waste in trees, and afterwards remainder-man for life dies, remainder-man in fee may bring action of waste (2).

A bishop after restitution of temporalties has a fee; the freehold when he dies is in the king. If tenant for life, by demise of the bishop's predecessor, commits waste during the vacancy,

If tenant for life, by demise of a bishop's predecessor, commits waste during the vacancy, the successor shall have an action for it.

(1) *Vide Berwick* v. *Whitfield*, 3 *P. W. Rep.* 76 265 1 *Bro Cha Rep* 150 3 *Bro Cha Rep.* 38. *Mildmay* v. *Mildmay*, 4 *Bro Cha*

(2) *Vide Farrant* v. *Lovel*, *ante* 723

the

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the successor shall have an action for it. *Co. Litt.* 356. *a. Fitz. Nat. Brev.* 112. And this action is not given him by the statute of *Marlbridge.* 2 *Inst.* 151, 152. 39 *Ed.* 3. 15. *b.* 2 *Ro. Abr.* 824. *Pl.* 3, 4, 5, 6, 7. If it was, he might sue for waste done in the time of his predecessor, which he cannot do; but this remedy is by the policy of the law.

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This court will grant an injunction to stay waste of trees for ornament, or belonging to a mansion house.

This court will go further than the common law can, as in the case of an intermediate estate for life there is no remedy at law for waste. *Mo.* 454. 1 *Rol. Abr.* 377. 1 *Vern.* 23. 2 *Freeman* 35. 2 *Show r* 59. But this court will grant injunction to stay waste of trees for ornament, or belonging to a mansion-house.

A first tenant for life gave leave to a second, who was without impeachment of waste, to cut timber, but the court granted an injunction, for he ought not to do waste before the estate, to which the privilege was annexed came into possession.

In *Abraham* and *Bab* Lord *Nottingham* cites a case that went much further, and preserved the contingent interest of the inheritance: the first tenant for life gave leave to the second, who was so without impeachment of waste, to cut timber, and yet the injunction was granted. The case of *Flemming* and the Bishop of *Carlisle* went on the same ground, because he ought not to do waste by anticipation, and before the estate to which the privilege was annexed came into possession. *Robinson* versus *Litton, December* 12, 1744 (1). went much further.

The third objection. Suppose a bill might have been brought by the trustees to stay waste, yet it does not follow that this bill is now proper for an account. The general run of cases are of injunction, because that is the most immediate relief; but it does not follow this method is not proper, and only one case cited to support that reasoning. *Jesus College* versus *Bloom, November* 19, 1749, *vide ante, p.* 262.) This point was not absolutely determined in that case. I was of opinion the college might bring trover, and therefore it widely differs from this case where no remedy can be at law.

Objection the fourth. If such bill may be brought, yet no decree could be for the value of the timber, or that the money should be laid out for the benefit of the contingent remainders; and in support of this, *Whitfield* versu *Bewet*, 2 *P. Wms.* 240. was relied upon; but the difference between that and the present case, is the collusion and contrivance in this.

Objection the fifth. The great length of time. But there is no statute of limitations in the way, nor are there any laches to be imputed to the plaintiff.

The bill was brought within three years after the plaintiff was of age. the inconvenience is not greater than in action at law by a remainder-man in fee after the death of the intermediate tenant for life: the plaintiff here agrees to accept so much for satisfaction as the defendant confesses in his answer to have received, so that there is no difficulty in directing the account.

Where the use of the recovery is declared to be to the recoveror and his heirs, it does not create a new estate, but he is in of the ancient use.

Objection the first. On the recovery suffered by the plaintiff the reversion is discontinued by it; and Lord *Coke* says, after waste is done regard is to be had to the state of the inheritance,

(1) *Atk.* 209, S. C.

which

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which muſt continue the ſame at the time of the action brought. *Co. Litt.* 356. *a.* That certainly is law: but the uſe on the recovery is declared to the plaintiff and his heirs; and in Lord *Derwentwater*'s caſe, 6 *Geo.* 1. this was held to be the ancient uſe [757] agreeable to *Abbot* and *Burton*, 2 *Salk.* 590. and ſo was *Martin* and *Straban*, *Hilary* 16 *Geo.* 2 (1). in the court of King's Bench, and afterwards affirmed in the Houſe of Lords.

Objection the ſeventh. That ſomething new ariſes in the ſtate of the cauſe, as it now ſtands, by the revival on the death of Sir *John Cotton* ſince the argument at bar. If an action of waſte would lie for the plaintiff againſt Sir *John Cotton*, yet that the remedy is gone by the death of Sir *John Cotton*, and conſequently an action of trover will not lie againſt the executor of the perſon that converted. Of this I give no opinion. Trover may be brought by an executor; and it ſeems ſtrange and contrary to juſtice that thoſe actions ſhould not lie againſt executors as well as for them: but be that as it will, yet the plaintiff is intitled to relief in this court in many caſes where at law the action *moritur cum perſona*, and parties may have remedy here afterwards. Before the fourth and fifth of *William* and *Mary*, c. 24. *ſect.* 12. there was no remedy at law againſt an executor of an executor, yet equity gave it, and it was laid down as a rule by Lord *Nottingham*, and he ſaid the common law would come to it in time. His prediction proved true, for it was determined ſo at law two years before the ſtatute. *Eaton College* verſus *Beauchamp*, 1 *Ch. Caſ.* 121. 2 *Mod.* 293.

Trover may be brought againſt an executor of the perſon who converted the timber to his own uſe.

To go further: In all caſes of fraud the remedy does not die with the perſon, but the ſame relief ſhall be had againſt his executor. Colluſion in this court is the ſame as fraud.

In all caſes of fraud the remedy does not die with the perſon, but the ſame relief ſhall be had againſt his executor.

This general argument *ab inconvenienti* was uſed on both ſides, which is of weight, eſpecially in a new caſe. On the part of the defendant it was ſaid, by this means timber would be locked up, and give occaſion for queſtions to ſpring up after a great length of time. Theſe are much leſs than the inconveniences on the other ſide, if contingent remainder-man can have no remedy in this caſe. The law allows of as many tenants for life as are in being at the ſame time; moſt family eſtates are in ſettlement, and frequently the firſt owner of the inheritance in being is a remote remainder-man. The remainder-man in fee might collude with the firſt taker, and though there are ever ſo many contingent remainders intervening, they might deſtroy the woods and exhauſt the mines, and when a ſon is born, he will have nothing left to ſupport the family. There being truſtees will not alter the caſe, if they have not notice of it. Artifices to ſupport neceſſitous and extravagant tenants for life increaſe daily:

Arguments *ab inconvenienti* are always of weight but more particularly in a new caſe.

(1) 2 *Stra.* 1179. 1 *Wilſ.* 65. 4 *Bro. P. C.* 486 5 *Term Rep.* 107. S. C.

in

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in *Fermor's* case, 3 *Co.* 79. the resolution was contrary to the statute of Fines, but the judges respected the general mischief.

[758] If the original limitations had been subsisting, I must have directed the money to be laid out and settled; but as they are barred, and the plaintiff has the fee in the estate, he must have the money.

As to interest. The condition of the timber when felled does not appear, nor whether any, and how much, was used in repairs, nor how much is grown up since; I shall direct it therefore to be computed no further back than from the filing of the bill.

" His Lordship declared, that on all the circumstances of " the case the plaintiff is intitled to recover satisfaction in this " court for so much value of his inheritance, as the defendant's " testator exhausted and received by virtue or colour of the " articles entered into between him and the plaintiff's late father, " who was tenant only for the term of 99 years, if he should so " long live; and ordered that the master to whom he referred it " should compute interest on the sum of 1000 *l.* admitted by " the answer of Sir *John Hynde Cotton*, deceased, to have been " received by him from the time of filing the plaintiff's bill, after " the rate of 4 *l. per cent. per annum*, and tax the plaintiff his " costs; and that what shall be so found due to the plaintiff for " the 1000 *l.* interest and costs be considered as a demand by simple " contract on the estate of Sir *John Hynde Cotton*, deceased, and " be answered and paid to the plaintiff by the defendants the " executors, they having admitted assets of their testator Sir " *John Hynde Cotton* by their answer to the bill of revivor (1)."

(1) *Reg. Lib.* A. 1752. fol. 240.

Case 290. *Worseley* versus *Johnson*, *November* 19, 1753.

T. S. seised in fee of lands devised the same *to his wife for life*, and after her decease to *R. B.* and the heirs of his body, and for want of such issue to be sold and divided amongst *his relations*, according to the statute of distributions where no will is made.

The wife is no relation to the husband, and the next of kin take the whole exclusive of her, both by the words of the will, and the intention of the testator (1).

THOMAS *Serjeant* being seised in fee of lands called *Crick*, in the county of *Northampton*, of 90 *l.* a year, devised the same to his wife for her life, and after her decease, to his kinsman *Ralph Bucknell*, and to the heirs of his body, and for want of such issue, to be sold and divided amongst *his relations*, according to the statute for distribution of intestates estates, where no will is made; and by the said will devised his houses in *Foster lane* to his wife, her heirs and assigns for ever.

Thomas Serjeant died in 1726, leaving his widow, who afterwards married *John Lydiard*, since deceased, and also left two

(1) See *Davis* v. *Baillie*, 1 *Ves.* 84. 1 *Bro. Cha. Rep.* 33.

aunts,

aunts, *Dorothy Hook*, and *Caſſandra Higginbottom*, both ſince dead, who were ſiſters of *Henry Serjeant*, the father of the teſtator, and his next of kin.

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Ralph Bucknell, before Mrs. *Serjeant*'s ſecond marriage, died without iſſue in 1727, and ſhe being adviſed, that herſelf, and the teſtator's next of kin, thereupon became intitled to the inheritance in fee in the eſtate of *Cruck*, in ſuch ſhares as they would have been intitled to his perſonal eſtate, in caſe he had died inteſtate, by virtue of the ſtatute of diſtributions, and that her intereſt in the inheritance, and the money to ariſe from the ſale of the ſaid premiſſes, was ſo veſted in her, that ſhe might diſpoſe of it by deed or will.

Before her ſecond marriage, the wife, with conſent of Mr. *Lydiard*, conveyed theſe lands, amongſt other things, to truſtees, their executors and adminiſtrators, for 99 years, determinable upon the death of *Suſannah Lydiard*, late *Serjeant*, for the uſes therein mentioned, and reſerved a power to herſelf of diſpoſing of this eſtate by will.

Afterwards, reciting her firſt huſband's will, and his deviſe of the ſaid eſtates, and that ſhe was intitled to diſpoſe of a ſhare that ſhould ariſe by ſale thereof, ſhe gave all her right and title thereunto, and all her ſhare ariſing by ſale thereof, to the plaintiff, his heirs, executors, adminiſtrators and aſſigns, for ever, and died in *January* 1750.

The repreſentatives of *Dorothy Hook* and *Caſſandra Higginbottom*, the teſtator's aunts, claim the whole money ariſing from the ſale of *Cruck*, in excluſion of the plaintiff, inſiſting the wife of the teſtator *Thomas Serjeant* was not intitled, being no relation, within the words of the teſtator's will, or his intention, nor a relation within the ſtatute of diſtribution.

Mr *Clarke*, for the teſtator's next of kin, cited the caſe of *Davis* verſus *Bailey* (1), *February* 8, 1747-8, there the words of the will were, "I give the reſidue of my perſonal eſtate to truſ"tees, to place out at intereſt, and to permit my wife to receive "the produce thereof for her life; and after her deceaſe, I give "it to ſuch of my relations as would have been intitled under the "ſtatute of diſtributions, in caſe I had died inteſtate, in ſuch "ſhares as the law directs: *Lord Hardwicke was of opinion, that* "*the wife in that caſe was not to be conſidered as a relation, and her* "*repreſentative not intitled to any of the huſband's reſidue as ſtanding* "*in her place.*"

A. gives the reſidue of his perſonal eſtate to truſtees, who are to permit his wife to receive the produce for her life and ſays, after her deceaſe, I give it to ſuch of my relations as would have been intitled under the ſtatute of diſtributions in caſe I had died inteſtate: *the wife not to be conſidered as a relation.*

Mr. *Wilbraham*, of the ſame ſide, argued, that, in conſtruction of law, a wife is not properly *a relation* to a huſband, for that word means next of blood, which a wife is not, but is nearer than next of kin, and ſtand in the ſame light as a king and

(1) 1 *Veſ.* 84. S. C.

ſubject,

Worsley v Johnson.

subject, or subject and king, guardian and ward, or ward and guardian.

A wife or husband, in law, are but one person, and cited a case out of 1 *Vern* to shew that where a devise was to husband and wife, and a third person, it was held a jointenancy in moieties, and the husband and wife to take only a moiety, as being but one; he also cited 2 *Mod.* 20, & 21.

Lord Chancellor,

Do you mean that the will intended *relations* at the determination of the estate tail, for I think it will in a great measure depend upon this.

Mr. *Wilbraham* said, that the testator did certainly mean so, and that he never had his wife in view, but intended if this remote contingency did happen, those who were the next relations should take, and who were such when the event took place, and not relations at the time of his death, and therefore the representative of the wife is not intitled to any share in the estate to be sold.

Mr. *Cox*, likewise of counsel for the defendant, said, that in the civil law, the wife was not considered as a relation to the husband in the same light with the next of kin, because she is called *affinis*, they *consanguinei*.

Mr. *Attorney General* for the plaintiff said, there was no occasion to enter into a nice discussion how far the wife is a relation to a husband, for the plain meaning of the words here, is, that it should be left to the law to determine it, and that such persons shall take under the word *relations*, as the statute of distribution would give it to, in case he died intestate; and can the counsel for the defendant deny that the statute gives the wife a share in an intestate's estate?

Lord Chancellor,

The case of *Davis* versus *Bailey* comes so near the present, that it is necessary I should look into it, and therefore let this cause stand over till *Tuesday* seven-night, and in the mean time desire to have a copy of that decree.

[761] *Worsley* versus *Johnson came on again November* 26, 1753.

Lord Chancellor,

THE bill is brought by the plaintiff, as executor of *Susanna Lydyard*, against the defendants, who are the next of kin of *Thomas Serjeant*, for a sale of his real estate, which he devised in the manner as has been already stated, and what he now claims is one moiety thereof under the statute of distributions, as the representative of Mr. *Serjeant's* wife.

This question depends on the construction of the will arising out of the words, and the intention of the testator.

In the course of the cause I have changed my opinion, which at first leant in favour of the wife.

What

What is the sense to be put on the word relation? In the will it is used in an improper manner; it signifies, in grammar, an abstract quality, any relation that arises in social life; but, in vulgar acceptation, it is transferred to a personal sense, and is so used in this will, as if he had said *kindred*, which is the word in the statute, and where the will refers to the statute, it must be taken as the statute takes it. WORSLEY v. JOHNSON.

Strictly, the wife is no relation to the husband; relation, in dictionaries, means *consanguinei* and *affinis*, but by the statute it means kindred by blood only.

Relation, in dictionaries means *consanguinei* and *affinis*; in the statute, kindred by blood only.

The wife is no relation by blood, nor by affinity: See *Calvin's Lexicon*, title *Affinitas*; the wife, says he, *non affinis est, sed causa affinitatis*; *affinis ab eodem stipite*. *Skinner*, title *Cognatio*, *Parentela*.

The wife *non affinis est*, *sed causa affinitatis*.

If the wife was next of kin, she must exclude all the rest.

The statute of 21 *Hen.* 8. *c.* 5 *sec.* 3. intitled *What fees ought to be taken for probate of testaments*, says, "in case any person die "intestate, the ordinary shall grant administration of the goods "of the person deceased, *to the widow* of the same person de-"ceased, or *to the next of his kin*, distinguishing more clearly be-"tween them than the statute of distributions.

The statute of H. 8 distinguishes more clearly between a wife and the next of kin, than the statute of distributions.

This, then, is the sense of the word *relation*, but if that would not answer the apparent intention, it must give way to it. [762]

I think, if the strict sense of the word does not take in the wife, it falls in with the intention, for he gives his wife the rents of the estate for life, and then to his nephew in tail.

Nothing can be more improbable, than to imagine he had in view his wife's being alive at the determination of the entail, to share in the distribution of the money at that time.

Should it go at fifty or one hundred years distance, ought it to go to the remotest representative of his wife, even in this case to the representative of the second husband of the wife?

Suppose he had ordered a division *between my own relations*, as the statute directs, this plainly would have included relations in blood only, and can never in common parlance mean his wife; and the words *my relations* mean the same as *my own*.

The word *my relation* means exactly the same as *my own relations*.

The case of *Davis* versus *Baily* is in point, and I can find no difference, for there the devise was, "to such of *my re-*"*lations* as would have been intitled by the statute of distribu-"tions."

His Lordship dismissed the plaintiff's bill without costs.

Case 291.

Evelyn versus *Evelyn*, *January* 14, 1754.

R. C. Amb 191. The question was, whether the personal estate of a brother who died intestate shall go wholly to his brother, or be divided equally between him and the grandfather. Lord *Hardwicke* of opinion it belonged intirely to the brother, and that the grandfather had no right to share in the distribution with him.

IN a former cause it was decreed, that the Master should take an account of the personal estate of *Charles Evelyn*, come to the hands of Sir *John Evelyn* his executor, and that the clear residue of the personal estate should be laid out in *South-sea* annuities in the name of the accountant-general, and placed to the credit of this cause, and he was to declare the trust thereof for the benefit of *John Evelyn*, son of *Charles Evelyn*, since the decree, *videlicet* On the 4th of *December* 1752, *John Evelyn* died a batchelor of fourteen years of age, leaving *Charles Evelyn* his only brother, who claims as next of kin, the residue of his late father's personal estate, and all the other personal estate of *John Evelyn* deceased, but on account of his infancy, administration of the goods, &c. of *John Evelyn* was granted to *William Evelyn*, for the benefit of *Charles Evelyn*.

Sir *John Evelyn*, the grandfather of the intestate, and of *Charles Evelyn*, insisting he was in equal degree of kindred to the intestate with *Charles Evelyn*, the present bill is brought

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against Sir *John Evelyn* to account for the personal estate of *Charles Evelyn* deceased, the father of the plaintiff *Charles Evelyn*, and that the same may be paid to the plaintiff, as part of *John Evelyn*, the testator's personal estate, and that the same, together with all other the personal estate of the intestate, may be placed out for the benefit of the plaintiff *Charles Evelyn*.

The defendant Sir *John Evelyn*, by his answer, insisted, that he being grandfather of the intestate, is in equal degree of kindred to him, with the plaintiff *Charles Evelyn*, and equally intitled with him to a distributive share of the testator's personal estate.

The cause was heard last *Michaelmas* term, and after consideration *Lord Chancellor* gave judgment to day.

The question is, whether the estate shall go wholly to the plaintiff the brother, or be divided between him, and the defendant the grandfather, as being equal, that is, second in degree by the civil law.

The statute of distribution must be the rule of determination in these cases.

The rules laid down after the general direction in the act, are only so many specifications of particular cases.

Twice determined: first, in *Pool* versus *Wilshaw*, and afterwards in *Norbery* versus *Richards*, and successive determinations make the law.

This question has been twice determined in *Westminster-hall* for the brother; first in the case of *Pool* and *Wilshaw*, the 9th of *July* 170[illegible], against the grandmother, by the unanimous opinion of the court; they were so deliberate, that they heard civilians before they determined it: and in the case of *Norberry* versus *Richards*, heard by the late Master of the *Rolls*, and might perhaps have been founded on the former authority; and it is successive determinations make the law.

But it has been said, notwithstanding, by the counsel for the grandfather, that these determinations are erroneous, for they are

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are in equal degree by the civil law; the common law indeed makes a difference, for the brother is in the first degree, and the grandfather in the second degree; but that law only takes place in matrimonial cases, and by the civil law, they are both in the second degree.

Yet I am of opinion that the decision in *Pool* versus *Whishaw* is right, and I shall abide by it till I see it reversed.

I have seen notes of Lord Chief Baron *Ward*, and Baron *Price*, they are loose ones indeed, but it appears by them that Doctor *Lane* was heard.

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Lord Chief Baron *Dod*'s note is short, but plainer than the former; it is said there, Doctor *Lane* argued, that this case was not to be determined by the statute, but by the civil law; and yet they all held, that there was no such usage since the statute, and dismissed the grandfather's bill.

This act was 83 years ago, and made on purpose to settle people's estates, but if it was *res integra*, I think there are just grounds to prefer the brother.

The words of the statute must be taken together, amongst the next of kin, *pro suo cuique jure*, according to the laws in such cases, and if by settled determinations, an equality or preference had been given, that is confirmed by this statute.

As to the consequence; First, The civil law is no part of the law of *England*, any further than it has been received here; and this with regard to personal estate.

Secondly, In real estates there is no degree between brothers, as held in *Ventris* 413. *Collingwood* and *Pace*, and in *Blackborough* versus *Davis*, 1 *P. Wms.* 41. the court relied on the old usages of *England*.

This alone would be sufficient to support the determination in *Poole* versus *Whishaw*, that it answers the intention of the act.

But it was argued from the civil law, that there is a ground for it: before the *Novells*, the father took all the child's fortune, the mother none at all; the grandfather of the child, if there were no granchildren, took the whole, that is the paternal grandfather, because the child was in pupillage to him, if there was no father. *Code* 6. *Lex* 48 & 49.

Before the *Novells*, the father took all the child's fortune, the mother none, the grandfather of the child, if no granchildren, took the whole *viz.* the paternal grandfather.

I do not find that it is any where said the *Novells* were ever admitted in any part of the Western empire; no country in *Europe* admits them intirely, but all follow some usages of their own: *the Novells* probably were determinations in the *Pretorian* courts, which *Justinian* in compiling his body of law adopted.

The Novells were never admitted intirely in any part of *Europe*, but all follow some usages of their own.

Novell 118. *c.* 2. lets in the brothers and sisters with the father and mother, excluding the grandfather, as is observed by the commentators, and it would be absurd to make that *Novell*

The 118th *Novell*, c. 2, lets in the brothers and sisters with the father and mother, excluding the grandfather, for, by ascending higher, it would admit such a number of persons, as must exclude brothers and sisters.

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admit the grandfather, &c. because, by ascending still higher, it would admit a greater number of persons, almost to the exclusion of brothers and sisters.

Vinius, p. 654. says, there are cases in which persons in the same degree, or perhaps nearer, may take, to the exclusion of those in equal degree.

This probably had prevailed in the *Prætorial* court, and adopted there might be *jus fictus*.

It would be a very great inconvenience to carry the portions of children to a grandfather, for it would be contrary to the very nature of provisions amongst children, as evey child may properly be said to have *spes accrescendi*.

Arguments of inconvenience, have been alluded to in courts of justice, and it would be a very great one in the present case, to carry the portions of children to a grandfather; the grandfather by the course of nature is old, must be supposed to have been provided for, and may very probably be in a dying condition, and not want it; the grandchild, on the contrary, is an infant, and a provision necessary for him to maintain him, and set him out in the world; besides such a determination would be contrary to the very nature of provisions among children, as every child may very properly be said to have a *spes accrescendi*.

I would not be understood, that the argument of inconvenience alone has weight enough to decide the question, but it is a reason at least for not unsettling former determinations; and if I was to vary in opinion, it would tend to alter distributions made since 1708, and disturb the peace of families.

"Therefore, in favour of the plaintiff, let the former decree "be carried into execution, between the parties to this suit, "in like manner as it ought to have been between the parties to "the original cause, and let the several accounts thereby direct-"ed be taken, be carried on before the Master; and as to so "much as shall be coming under the decree for the share of "*John Evelyn*, the infant, who is dead, and also the surplus "of all other the personal estate, of *John Evelyn* the infant; "His Lordship declared, that the same belongs wholly to the "plaintiff *Charles*, his surviving brother, and the defendant Sir "*John Evelyn*, the grandfather, has no right to share the dis-"tribution with him, and referred it to the Master, to take an "account of the personal estate of *John Evelyn*, the infant de-"ceased, and that what shall be coming for the clear surplus "of the personal estate of *John Evelyn* the infant, he directed to "be applied for the benefit of the plaintiff *Charles Evelyn*, his sur-"viving brother and placed out at interest in securities, in like "manner as was directed concerning the share of the infants by "the former decree (1)"

(1) *Reg. Lib.* A. 1753. fol. 94.

January 29, 1754, ex parte Venner and others, Guardians of John Vennor of Wellsborne in the County of Warwick, Gentleman, on the behalf of him as a Minor under the Age of 21 Years. Case 292.

A Writ of *ad quod damnum* lately issued directed to the sheriff of *Warwickshire*, commanding him by the oath of honest and lawful men of the county, to inquire whether it would be to the King's prejudice, or of any other, if he should grant to *George Lucy*, Esquire, a licence, that he may inclose a certain cart-road or cart-way in the parish of *Charlcot* in the said county, leading from thence to the town of *Stratford upon Avon* through several closes and inclosed grounds in the writ mentioned, which road is to contain 1378 yards of land in length and nine yards in breadth, as the same hath for many years last passed been used and enjoyed, to hold the same so inclosed to the said Mr. *Lucy* and his heirs for ever; so that instead of the said way he make another road or cart-way in his own soil as convenient for passing thro' the same. And the petition further set forth, that Mr. *Lucy* having obtained the said writ, caused a jury to meet at his house in *Charlcot* of the 4th of *October* 1754, being three days before the quarter-sessions holden for the county of *Warwick*, without any notice given for that purpose, at which time and place an inquisition was taken before the under-sheriff, in and by which the jurors therein named said it would not be to the prejudice of the King, or of any other, if he should grant to Mr. *Lucy* a licence to inclose the road or way in the writ mentioned, to hold it so inclosed to him and his heirs for ever; so that instead of the said road he do in his own soil set out one other cart-road as convenient for passengers through the same, as in and by the writ is mentioned and directed.

An application to the court to set aside a writ of *ad quod damnum*, on a suggestion of surprize upon the inhabitants of the neighbouring villages, when the inquisition was taken thereon; and for want of a new road being set out (in lieu of the road taken away by the person who sued out the writ) in his own ground. Lord *Hardwicke*, on all the circumstances of this case, of opinion there was no surprize nor necessary the new road should be set out by the person who sues out the writ, in his own soil.

And it was represented by the petition, that the cart-road so intended to be inclosed is a large, spacious and open road, greatly used by coaches, waggons, &c. passing between *Stratford* and *Warwick*, and that the road intended to be made use of instead thereof is not 800 yards round about, but is a very hilly and uneven road, and no materials near thereto for the repairing the same. And the petitioner further set forth, that a very trifling part of the road so intended to be used is in the soil of Mr. *Lucy*, though the writ requires a new road to be set out altogether in the soil of Mr. *Lucy*, but on the contrary thereof near three parts out of four of the same goes through Mr. *Vennor*'s grounds, and should Mr. *Lucy* obtain a licence for the inclosure, it would lessen Mr. *Vennor*'s estate near 20 *l.* a year, as the stopping up so great a road would be the means of driving the whole country through Mr. *Vennor*'s estate.

The petition further set forth, that they had no knowledge of the writ being sued out till the day before the same was executed, when Mr. *Vennor* by accident heard that a jury was to meet at Mr. *Lucy*'s house on the 4th of *October* about changing the roads, on which day Mr. *Vennor* attended in his grounds from ten in the forenoon [767]

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forenoon till after one, expecting the jury would have come to have viewed the same in that time, but after waiting to no purpose, he went to Mr. *Lucy*'s house, who told him the jury had viewed the roads, but gave him no opportunity of speaking to the jury.

The petition further set forth, that after being informed such writ was executed, and that the inquisition taken thereon was in favour of Mr. *Lucy*, the petitioner gave notice they should appeal against the same at the next quarter-sessions, which were held at *Warwick* on the *Tuesday* following, and the petitioners did after the writ was executed apply to the under sheriff for a copy of the writ and inquisition, that they might be certain what road was intended to be inclosed, and what was intended to be used instead thereof, that they might be able sufficiently to instruct their counsel; but he declared he had lett them with Mr. *Lucy*; and your petitioner did then apply to Mr. *Lucy* and his attorney, and to the clerk of the peace for the same, but to no purpose, but could not procure a copy untill the morning the appeal was tried: And the petition further set forth, that two of the jurors who took the inquisition appeared at the sessions, and voted as justices on behalf of Mr. *Lucy*, and ordered the writ and inquisition to be recorded; *for these reasons and for as much as Mr.* Lucy, *does not set out any new road, or give one yard of land in lieu of the road intended to be taken away, the petitioners prayed that the writ and inquisition taken thereon may be set aside, and a new writ awarded, and in the mean time all further proceedings on the said writ of* ad quod damnum, *and the inquisition already taken, may be stayed, or such other relief as may seem meet.*

At the same time a petition was presented by the inhabitants of several neighbouring towns where the road intended to be made is, stating the same matters, and making the same objections as in Mr. *Vennor*'s petition, and praying likewise the writ of *ad quod damnum* might be discharged, and which was argued by counsel, and came on to be heard with Mr. *Vennor*'s petition.

Mr. *Wilbraham* for the petitioners.

The constant form of the writ *ad quod damnum* is, that the person applying should carry the new road through his own land.

The present application is to set the writ aside for Mr. *Lucy*'s not doing what the writ requires, and likewise upon a suggestion of surprize in taking the inquisition on the writ of *ad quod damnum*.

I do allow that no notice is absolutely required, but then [768] throughout the law, in every office of inquisition, the King is to be satisfied, or subject, that there is no damage to either, and that it ought to be done in the openest manner imaginable.

In the Year-books, 34 *Edw.* 3. it is laid down the inquisition is to be taken in good towns openly, and not privily; the same again was held in 36 *Edw.* 3.

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The ſame rule prevails in the ſtatute of *Henry* 8. relating to eſcheators, where it is declared every perſon is to give evidence openly on pain of *forty pounds*.

In the caſe of Sir *Oliver Butler*, 2 *Ventr*. 344. the writ was executed the day it bore date, and at thirty miles diſtance from the place.

Here the writ was executed only on the 4th of *October* 1754, and the appeal to the quarter-ſeſſions was heard upon the 8th of the ſame *October*. Six juſtices againſt two were for regiſtering the inquiſition.

The ſtatute 8 & 9 *W*. 3. *ch*. 16. gives the appeal. The quarter-ſeſſions in this caſe being an appellate juriſdiction, there ought to be a reaſonable time allowed for perſons appealing, to lay the whole facts before the court.

The inquiſition was ſigned on the *Friday*, Mr. *Lucy*'s ſteward kept it till the *Wedneſday* morning till within one hour before the appeal came on.

Mr. *Robinſon* counſel of the ſame ſide.

The expreſs condition of the writ is, that the perſon ſuing out the writ ſhould lay out the new road at his own expence, but not one ſyllable of evidence has been given to the jury about it; the petitioner Mr. *Vennor* likewiſe applied to the under-ſheriff for a copy of the writ; he anſwered it was not in his power to give it, it was in Mr. *Lucy*'s hands; and the petitioner could not procure a copy till the *Wedneſday*, the very day of the appeal; he cited 7 *Mod. alias Farreſley*, on the conſtruction of 8 & 9 *W*. 3.

Mr. Attorney General of counſel for Mr. *Lucy*.

Whether the road turned, or ſet out, be to the damage of the country, is not the queſtion now; the only queſtion is, whether the execution of the writ has been done ſurreptitiouſly and fraudulently, and without the perſons who are affected by it, having an opportunity of objecting to any damage that might [769] enſue to the country, and if ſo, whether it ought to be quaſhed.

The material point for the conſideration of the court is, whether there has been any ſurprize in this caſe.

It was done with notoriety, for the petitioners were fully informed of it: as to the execution of the inqueſt of office, no preciſe form of notice is required either in the church or market-place, but is left intirely to the diſcretion of the under-ſheriff.

The notice was given on the 30th of *September* to the perſons who were to attend as the jury.

The perſons ſummoned on the jury were men of fortune and reputation, and the greateſt part of them have eſtates in *Charlcot*, where Mr. *Lucy*'s ſeat is, and where the road is turned.

Though the act of parliament directs the appeal to be at the next quarter-ſeſſions, yet if Mr. *Vennor* had deſired time, the juſtices would have indulged him by putting it off to another quarter-ſeſſions.

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The hearing on the appeal lasted several hours, the evidence of the new road being half a mile about was laid before the justices, the particular damage to Mr. *Vennor* likewise was insisted upon, and attempted to be proved.

But supposing the justices have done right in confirming the inquisition, yet the petitioners' counsel insist that the new road ought to go through the soil of the person who sues it out.

These are words of course in every writ of this kind, and never meant to be strictly pursued.

Sir *Oliver Butler*'s case was a surreptitious execution of a writ of inquisition as to a market, the inquisition there was executed the day after the writ bore date.

The only case in equity was mentioned by your Lordship, which was in 1721, before Lord *King*, the *Earl of Salisbury* versus *Archer*, there the writ of *ad quod damnum* issued the 20th of *April*, the jury came twenty miles from the place, was executed the day after the teste of the writ, and there was a beginning to inclose before the quarter-sessions at *Winchester*, seven justices out of thirteen were of opinion they could not enter into it, the appeal not being at the next quarter sessions after the inquisition.

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LORD CHANCELLOR,

In case upon writs of ad quod damnum, this court must judge according to rules of law.

Applications of this nature do not come frequently before the court; but when they do, this court, as an *officina brevium*, must judge according to rules of law.

The only proper question is, whether there has been any surprize in the execution of this writ on the persons petitioning, by preventing them from laying evidence before the jury at the time of the inquisition, or before the justices on the appeal; and whether Mr, *Vennor* is not too late now to take it up.

The inconvenience to the public in these cases not inquirable here, being a jurisdiction belonging to the quarter-sessions only.

The inconvenience to the public in cases of this nature is not to be tried before me; for if I was to enter into it, I should be setting up my jurisdiction in opposition to a jurisdiction appropriated by act of parliament to the quarter-sessions only.

I am of opinion therefore I can take no further notice of this head of inconvenience, than as it may be auxiliary to the surprize suggested by the petition.

If the jury had manifestly done contrary to the general good of the country, it might have afforded a strong corroborating evidence of surprize.

The writ of *ad quod damnum* was tested the 17th of *September*; notice was given on *Monday* the 26th to attend on *Friday* the 30th.

Sufficient if the inquisition is executed in a fair and open manner,

It is not the shortness of the time, where the law has not prescribed any particular time, which is alone sufficient evidence of surprize; that the inquisition is taken and executed in a fair and open manner is all that is required.

Then it comes to this, whether there was an intention of surprize, or any actual surprize?

Neither have been made out to my satisfaction.

Mr. *Lucy* swears he directed the sheriff to summon a fair and impartial jury, and out of the towns in the neighbourhood.

All

All the towns but one from which the jury came, were contiguous to the road. *Ex parte* VERNOR.

This was Mr. *Lucy's* direction: and the under-sheriff swears he gave orders to his officers to summon the gentlemen, who lived nearest the road.

They appear to be persons of great fortune; *Sir Charles Mordaunt* the knight of the shire was amongst them. it is not at all probable these gentlemen would do an unpopular thing in turning the road, which is a circumstance at least to shew fairness. [771]

The clause in the act of parliament to be sure is drawn in a very extraordinary manner, but it is not necessary to observe upon that in the present case.

One general answer to the whole in regard to the appeal is, that Mr. *Vernon*, &c. did actually appeal to the quarter-sessions, and the matter was fully heard.

The place is within four miles of *Warwick*; the quarter-sessions was held there, and the trial lasted four hours.

No evidence has been laid before me that there was any material witness, who could not be had then from the shortness of the time.

Though the appeal by the act of parliament is directed to be at the next quarter-sessions, yet it is in the power of the justices to adjourn the quarter-sessions itself to another day, or they might have adjourned this particular matter to a subsequent sessions.

Tho' the appeal is directed to be at the next quarter-sessions by 8 & 9 *W.* 3. the justices may adjourn it to a subsequent sessions.

Another point which has great weight with me is, whether the appeal to the quarter-sessions is not waving the objection of surprize with respect to the mal-execution of the writ, and I rather think it is a waver of it.

In the case before Lord Chancellor *King*, in 1721, the appeal was to the *Easter* quarter-sessions, and the objection was, that the inclosure was before *Christmas* quarter-sessions, and therefore it was dismissed because it was not the next immediate quarter-sessions.

It has been truly said, the statute has put the justices in the room of the traverse.

Suppose before the act of parliament the petitioners had traversed the inquisition, and issue had been taken upon it, and a verdict had been found for the inquisition;

Could the petitioners afterwards have applied to this court upon a suggestion of surprize, and a fraudulent and clandestine execution of the writ? certainly they could not.

It has been said that, in order to comply with the writ, Mr. *Lucy* must set out a way in his own ground which will communicate with the highway; the *terminus ad quem* for the benefit of the country, but it is not necessary the whole new road should go through his own soil. [772]

Here Mr. *Lucy* has bound himself and his heirs to keep the road in repair, which is more than is absolutely necessary; for I

Where a new road is made, and the parish can be at no further expence with regard to the old one, the inhabitants ought to repair the new for the future

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Ex parte Vernon.

am of opinion, after he had once made the new road, as it is established in the room of another in the very same parish, who can be at no further expence with regard to the old road, as it is taken into Mr. *Lucy*'s park, the inhabitants ought to have repaired the new road when made for the future.

Where the new road lies in another parish, then the person who sued out the writ, and his heirs, ought not only to make it, but keep it in repair.

But if the new road had lain in another parish, there he ought not only to have made it, but he and his heirs ought to have kept it in repair; because the inhabitants of another parish have gained no benefit from the old road being laid into Mr. *Lucy*'s park, as they had nothing to do with the repair of it.

Upon the whole, as there does not appear to me to have been any surprize at the time of the inquisition, and the matter was fully laid before the justices on the appeal, I ought not to set aside the writ; therefore the petition must be dismissed.

Case 293. *Blower* versus *Morrets*, *Monday April* 1, 1754, at *Powis House*.

Where costs are decreed to all parties out of a real estate, tho' one of them, who was intitled to receive costs, died before they were taxed, they do not *moriuntur cum persona*, but his heir at law is intitled (1).

BY a decree in this cause costs had been decreed to all parties out of a real estate; one of the parties, who was intitled to receive costs, dies before they had been taxed.

It was insisted that, as to this person, the costs *moriuntur cum persona*.

Lord Chancellor said, he thought this a severe rule, and that a distinction might be taken in the present case as the costs are by the decree made a lien on real estate; and upon asking the bar, if they knew any authority to warrant such a distinction, Mr. *Hoskins* said, Your Lordship took the distinction in Lord *Oxford*'s cause, and Mr. *Bignell* mentioned that the Master of the Rolls had taken the same distinction in a case of *Howard* versus *Hall* at the last seal.

If any thing had remained to have been done and undecreed, the representative of the deceased party by reviving would have been intitled to the costs, even if they had not been directed to stand a charge on the real estate.

Here every thing was settled by the decree, and therefore nothing left which could make a bill of revivor necessary; if there had been any thing remaining to be done, the representative of the deceased party, by reviving the cause, would have been intitled to the costs decreed, even if they had not been directed to stand a charge on the real estate. Lord Chancellor ordered the cause to stand over till *Wednesday* to look into, and upon its coming on that day, *his Lordship* said, the general rule that there can be no revivor by executor or administrator for costs, when costs have not been taxed, is upon this principle, that costs are looked

(1) *Vide White* v. *Hayward*, 2 *Ves.* 579. S. C. *Hall* v. *Smith*, 1 *Bro. Cha.* 461. *Kemp* v. *Mackrell*, post 812. 2 *Ves. Rep.* 438.

upon

upon as a wrong, and therefore *moritur cum persona*. All these cases have been determined where costs are decreed personally, otherwise where they have been decreed out of real estate.

BLOWER v. MORRETTS.

The case of *Johnson* versus *Leake* (1), and which was heard before me on the 25th of *July*, 1752, was as follows:

"There was a decree for a sum against an executor, with "costs out of assets; the executor pays the sum, but not the "costs; and then the plaintiff dies, and a bill is brought to re-"vive for costs."

"It was objected, that a bill to revive for costs only was im-"proper, and that the payment out of assets was only incident "to the costs in respect to the sum decreed."

"I ordered the cause to stand revived; for the rule not to re-"vive for costs only, I thought a hard rule, the costs being fre-"quently more than the debt; and this case was not within the "rule, for it was not a decree *in personam*, but executory, and "to be paid out of assets; and if the executor had died, the "plaintiff might have revived against the representative of the "testator, and might have pursued the assets into whatever hand "they came."

A decree for a sum against an executor with costs out of assets, is not a decree *in personam*, but executory; and if he dies, the plaintiff may revive against the representative of the testator, and pursue the assets.

I think this is a very reasonable distinction; this court has followed the rule of law, where there is a judgment, costs are ascertained and taxed; but if no judgment, the costs are lost.

An executor or administrator could not have a writ by *journeys accounts*, nor an heir at law, for that writ lay only between the same parties, so that at law all costs are personal, but here, where there is a fund to answer costs, and which is made liable, the representative by reviving will be intitled.

The writ by journey accounts lies only between the same parties, neither an executor, nor administrator, nor heir can it have it.

Let the master tax the costs of *Benjamin Morrets* and his wife, the heir at law of the person who was intitled to the costs according to the decree, and let what shall be found due on the taxation be paid out of the money which arose out of the sale of the real estate, and now lying in the *Bank* (2).

(1) 2 *Ves* 465. S. C. (2) *Reg. Lib.* A. 1753. fol. 369.

Case 294. *December 12, 1753; and April 25th and 29th, 1754.*

Smart Lethieullier, Esq; and Richard Rogers, Gent. and others, by original Bill, — } Plaintiffs.

Mary Tracy, the Wife of Thomas Tracy, Esq; late Mary Dodwell, and others, —— } Defendants.

And

Smart Lethieullier and Richard Rogers, Gents. surviving Executors and Trustees of Sir William Dodwell, by supplemental Bill, —— } Plaintiffs.

Dodwell Tracy, an Infant, by Thomas Tracy his Father and Guardian, —— } Defendant.

S. C. ante 728, 730, post 784, 793. Amb. 204. 220. Lord *Hardwicke* of opinion to construe the contingency in the will of Sir *W. Dodwell*, daughter's dying without issue of her body living at her death, to the death of Sir *H. N.* a remainder-man under the will before 21, and that the subsequent limitations to Sir *H. N.* after attaining 21, and to *S. L.* and *C. L.* are not contingent but vested remainders.

EXTRACTS from the will of Sir *William Dodwell* upon which the points in this cause depended:

First, I give and devise all my manors, lands, &c. in the counties of *Gloucester*, *Middlesex*, *Buckingham*, *Kent*, and the city of *London*, and elsewhere in his Majesty's dominions, to my daughter *Mary Dodwell*, during her natural life, and from and after the determination of that estate, to several trustees therein named, and their heirs, during the life of my said daughter, in trust, to preserve the contingent remainders, &c. herein after limited, from being destroyed: *And from and after the decease of my said daughter to the use of the first son of the body of my said daughter, lawfully to be begotten, and to the heirs male of the body of such first son*, lawfully to be begotten: *and for default of such issue, to the second, third, fourth, fifth, sixth, and every other son* of my said daughter, lawfully to be begotten, severally and successively as they shall be in priority of birth and seniority of age; *and the heirs of their respective bodies* lawfully to be begotten severally and successivelly as they shall be in priority of birth and seniority of age; *and for want of such issue, to the daughter or daughters* of my said daughter *Mary Dodwell*, severally, *and to the heirs of their respective bodies*, lawfully to be begotten.

Then comes a proviso to raise portions for younger children, charged upon the real estate and estates to be purchased with the personal estate.

[775] *Item*, I do hereby give and devise unto the said trustees, &c. and to the survivors of them, all my mortgages, stock, annuities, bonds, ready money, plate, and all other my personal estate that I shall die possessed of, or be intitled unto, at the time of my decease, and not otherwise disposed of by this my will, *upon trust*, after payment of debts and legacies, that they shall convert the said stock, annuities, and other personal estate, into money, and lay out such money in the purchase of lands

of inheritance, in the said county of *Gloucester* or some other adjacent county, to be settled *upon my said daughter and her issue*, in such manner as I have already devised my said manors, woods, wood-grounds, tenements, rents, annuities, and hereditaments.

And upon this further trust, that the rents and profits of the lands so to be purchased (when purchased) and also the rents of all my messuages, lands, tenements and hereditaments, shall be laid out by my trustees, &c. in the purchase of other lands of inheritance in the same counties, to be settled in the same manner, and to the same uses, as the lands so purchased with my said personal estate are directed to be settled. *And I do* hereby further will and direct, that the said trustees shall from time to time receive, as well the rents and profits of my said manors, messuages, lands, &c. herein before by me devised to my said daughter during her minority, *as also the rents and profits of the lands so purchased with my said personal estate, and profits of my said real estate*, and lay out the same in the purchase of other lands of inheritance in the same county or counties, to be conveyed and settled in the same manner, as the lands so directed to be purchased by and with my said personal estate shall be settled.

And in case that my said daughter shall depart this life without issue of her body living at her decease, then I do hereby give and devise unto the said trustees, and their heirs, all my manors, messuages, lands, tenements, woods, wood-grounds, rents, annuities and hereditaments whatsoever, *until my cousin Sir Henry Nelthorpe*, Baronet, son of my niece Dame *Elizabeth Nelthorpe* deceased, by Sir *Montague Nelthorpe*, Baronet, also deceased, *shall attain the age of one and twenty years*; and also all my personal estate, to be laid out in the purchase of lands as aforesaid, upon trust, that they or the survivor of them, or the heirs of such survivor, shall from time to time receive the rents and profits thereof annually, as well of the estates so to be purchased, as of all other the premisses so as aforesaid devised to them, and lay out the same in the purchase of lands of inheritance in the said county of *Gloucester*, or some other adjacent county, and also the rents and profits of such lands so to be purchased by the rents and profits of the premisses, *until my said cousin Sir Henry Nelthorpe shall attain such age of one and twenty years*; then I will that they or the survivor of them, or the heirs of such survivor, shall convey the lands so purchased to the same uses and upon the same trusts, as I by this my will do devise all my said manors, messuages, lands, tenements, rents, annuities, hereditaments and premisses, after my said cousin Sir *Henry Nelthorpe* shall have attained his age of one and twenty years as aforesaid. [776]

Item, I give and devise all my manors, messuages, &c. *unto my said cousin Sir* Henry Nelthorpe, *after he shall have attained his age of one and twenty years (he taking upon him the name of* Dodwell *for and during the term of his natural life*, without impeachment of waste; and from and after the determination of that estate, to them the said trustees and their heirs, during the life

LETHIEULLIER v. TRACY.

of my said cousin Sir *Henry Nelthorpe*, in trust, to preserve the contingent remainders herein after limited from being destroyed: *and from and after his decease to the first and every other son in tail male; and for default of such issue, to the daughter and daughters of the said Sir* Henry Nelthorpe, *and the heirs of their body and bodies*: and in default of such issue, *or in case my said cousin Sir* Henry Nelthorpe *shall happen to die before he attains his said age of twenty-one years and without issue, then I give and devise the same manors and premisses to* Smart Lethieullier (*he the said* Smart Lethieullier *taking upon him the name of* Dodwell) *for and during the term of his natural life, without impeachment of waste*: and from and after the determination of that estate, to the said trustees and their heirs, during the life of the said *Smart Lethieullier* in trust, to preserve the contingent remainders herein after limited from being destroyed, &c. *and from and after his decease, to the first and other sons of the said* Smart Lethieullier *in tail male; and for default of such issue, to* Charles Lethieullier (*he taking upon him the name of* Dodwell) *for and during the term of his natural life, without impeachment of waste*; and from and after the determination of that estate to the said trustees, during the life of the said *Charles Lethieullier*, in trust, to preserve contingent remainders herein after limited from being destroyed; *and from and after his decease, to the first and other sons of the said* Charles Lethieullier *in tail male; and for default of such issue, then*——

There having been several orders in the cause of *Lethieullier* and *Tracy* in relation to a settlement to be made of the estates purchased pursuant to the will of Sir *William Dodwell*, and the decree made the 9th of *July* 1728 for carrying the trusts thereof into execution, and that the settlement should be made with the approbation of the master, he, by his report of the 22d of *July* 1752, certified, that he had settled the conveyance accordingly. The plaintiffs took the following exception to the master's report:

"For that he hath, between the limitation to the daughters "of the said *Mary Tracy* and the heirs of their respective bodies, "and the estates limited to the said *Smart Lethieullier* and to the "said *Charles Lethieullier*, and their issue male successively, in- "serted these words: *And in case the said* Mary Tracy *shall de- "part this life without issue of her body living at her decease*; where- [777] "as, according to the intent and meaning of the said will of "Sir *William Dodwell*, it ought to be, *and in default of such "issue*."

Mr. *Tracy Atkyns*, of counsel for the defendants against the exception taken by the plaintiffs in the supplemental bill to the Master's report.

The question upon which this exception will depend is whether the remainder to the *Leithieulliers* is *a contingent* or a vested remainder under the will of Sir *William Dodwell*.

First, Whether the words make a contingent remainder.

The testator could not possibly make use of properer words for the purpose of creating a contingent remainder; and in order to

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ſhew this, permit me to mention two rules laid down by Lord *Coke* to determine what are contingent eſtates.

The firſt is *Lovie*'s caſe 10 *Rep.* 85. *a.* "That where it is dubious "and uncertain, whether the uſe or eſtate limited *in futuro* ſhall "ever veſt in intereſt or not, then the uſe or eſtate is *in contin-* "*gency*; becauſe upon a future contingent it may either veſt or "never veſt, as the contingent ſhall happen."

To apply this to the preſent caſe:

If Mrs. *Tracy* dies *without leaving iſſue*, the eſtate limited to the *Lethieulliers in futuro* veſts; but if ſhe dies and *leaves iſſue living at her death*, the eſtate to the *Lethieulliers* does not veſt.

Then it is dubious whether the eſtate limited to the *Lethieulliers* will ever veſt in intereſt or not, and falls exactly within the rule in *Lovie*'s caſe.

The ſecond rule is, "If a particular eſtate upon which the "remainder depends may determine before the remainder may "commence, then the remainder is contingent." Lord *Coke* 3 *Rep. p.* 20. *Boraſton*'s caſe.

So here the eſtate for life to Mrs. *Tracy*, which is the particular eſtate whereon the remainder to the *Lethieulliers* depends, may determine before their remainder may commence.

For Mrs. *Tracy* may die, which determines *the particular eſtate*, and yet if ſhe leaves iſſue living at her deceaſe, the remainder to the *Lethieullier* does not commence, becauſe their remainder cannot take place unleſs ſhe dies without iſſue; and therefore, according to the rule in *Boraſton*'s caſe, it is a *contingent remainder*.

Next as to the intention of the teſtator. [778]

There is nothing upon the face of the will, to warrant the conſtruction the plaintiffs would put upon it.

It was of his drawing; the words he uſes are not to be ſuppoſed the work of chance, but of deſign and intention, becauſe Sir *William Dodwell* was of the profeſſion of the law, and being concerned chiefly in conveyancing, he muſt know the force and legal operation of theſe words.

The ſituation of the teſtator at the time of making the will is material; he was very near *ſeventy*, the age of his daughter alſo, at that time, ſhe was only *one year* old, his ſituation likewiſe with reſpect to the limitations, are proper ingredients in the conſideration of this caſe.

The *Lethieulliers* were not at all related to him in conſanguinity, very remote even in affinity, great if not doubly great nephews to Sir *William Dodwell*'s *firſt wife*.

The teſtator being ſo old, and his daughter ſo young, he muſt of courſe foreſee a long minority; is it probable therefore he ſhould extend the chance of the *Lethieulliers* ſucceeding to his eſtates beyond the death of his daughter without iſſue of her body living at her deceaſe?

Were not the odds very great, conſidering how extremely young ſhe was, that ſhe did not live to be of age; and can it be ſuppoſed that for the ſake of ſuch diſtant relations or hardly any

Lethieullier v. Tracy.

any relations at all, he would keep so large a property locked up for so great a length of time?

Mrs. *Tracy* being an infant of three years only when he died, she might not probably have issue in 18 or 20 years after his death; that issue might live 20 years more, which is a period of no less than 40 years, and yet die before they were of a proper age to bar these remainders, and the issue of that issue in the same manner, and so on *in infinitum*.

This would have been creating a perpetuity, which, the testator knew, is what the law will by no means endure; and therefore it is natural to suppose would chuse the words that he has here made use of should convey no other meaning and import than what is contended for in behalf of the defendants; and that I am right in insisting that the remainder to the *Lethieulliers* is a *contingent remainder*, and cannot take place, unless Mrs. *Tracy*, the daughter of the testator, should depart this life *without issue of her body living at her decease*.

[779] For from the observations that have been made on the situation of the testator at the time he made his will, the age of his daughter, and the very remote relationship in which the *Lethieulliers* stood to him; this appears to be the obvious and proper construction; and the Master, as he was very well warranted to do, having pursued the very words of the will, which correspond too with the intention of the testator, it is humbly insisted there is no foundation for the exception taken by the plaintiffs to the Master's report, and that it ought to be over-ruled.

Lord Chancellor: It is extremely plain to me, that the testator Sir *William Dodwell* intended to make a strict intail; nothing shews it more strongly than the clause in the will, which obliges the remainder-man to take the name of *Dodwell*.

As to his real estates he was seised of at the time of making his will, they are devised as legal estates, and no trust created of them.

Then with regard to the other branch of his estate, the personal estate is by the will directed to be laid out in land to be conveyed to trustees. To what uses? Why, to the same as he had settled his real estate he left at the time of his death.

First question. Whether the limitation to Sir *Henry Nelthorpe* is contingent *in case Mrs.* Tracy *should die without issue of her body living at her decease*, or if he attained 21, that it should be a vested remainder?

And also, Whether the remainder to the *Lethieulliers* are likewise contingent remainders?

The first limitation under the will is to the testator's daughter for life, then to her first son *and the heirs male of his body* only.

This is a mere slip and oversight, because the remainder to the other sons is to them *and the heirs of their bodies* generally.

Then he provides portions for the younger children of his daughter *Mary Dodwell*, now Mrs. *Tracy*, and then comes the devise

devise to the trustees; then a power to them to receive the rents and profits, &c. till his daughter should attain her age of 21 years. LETHIEULLIER v. TRACY.

And then follows the clause which created the difficulty:

And *in case my daughter shall depart this life without issue of her body living at her death*;

Then he gives all his manors, &c. to the said trustees, until his cousin Sir *Henry Nelthorpe* should attain his age of 21 years. [780]

This is a remainder, and a contingent remainder, and the devise to the trustees is not, as was contended, an absolute fee, but a determinable fee, in case Sir *Henry Nelthorpe* should die before 21 without issue.

The devise to the trustees is not an absolute, but a determinable fee, in case Sir *H. N.* died before 21, without issue.

Then follow the words which shew a continuation of the power in the trustees of receiving the rents and profits as well of the estates to be purchased as of all other the premisses, and laying out the same in the purchase of other lands of inheritance, &c. the very same he had before given during the minority of Mrs. *Tracy* his daughter.

Then comes a substantive independent clause.

Item, I give and devise all my manors, messuages, &c. to my said cousin Sir *Henry Nelthorpe*, after he shall attain his age of 21 years (he taking the name of *Dodwell*) for life, with limitation to his sons and a limitation to his daughters.

And in default of such issue, or in case my said cousin Sir *Henry Nelthorpe* shall happen to die before he attain his age of 21 years and without issue, then to *Smart Lethieullier*, he taking upon him the name of *Dodwell*, for his life, *without impeachment of waste*, remainder to his first and other sons in tail male, remainder to *Charles Lethieullier* (he taking upon him the name of *Dodwell*) for his life, without impeachment of waste, remainder to his first and other sons in tail male; and for default of such issue, then [*a blank left in the will.*]

All the limitations of the real estate are, as I said at first, limitations to the trustees in case Sir *Henry Nelthorpe* should die before 21, and is contingent only during his minority.

To be sure it is very awkwardly penned.

But his view was, as his daughter was extremely young, and therefore might die before Sir *Henry Nelthorpe* attained 21 to accumulate the rents and profits in the mean time till these contingencies were determined, and had certainly a respect to this double minority.

So that after Sir *Henry Nelthorpe* attained 21, his remainder, and all the subsequent limitations as are subject to the contingency, are vested ones.

Item I give and devise all my manors, &c. I take to be a substantive devise, and not at all relative to the former devise to the trustees upon the contingency of Mrs. *Tracy*'s dying without issue, &c. [781]

Suppose Sir *William Dodwell* had lived till Sir *Henry Nelthorpe* attained twenty-one, would not this devise to him have been a vested remainder?

LAWRENCE-LYE v. TRACY.

I am of opinion it would, and all the subsequent remainders would have been so likewise.

This I take to be the meaning of the testator, and not to defeat all the limitations to the families he had adopted, and laid under an obligation of taking his name upon this single contingency of his daughter having issue at the time of his death.

The words are, *In default of such issue*, not merely in default of issue of Sir *Henry Nelthorpe*, but of all other persons who take under this will, and are before mentioned.

Where the general intent is to make a strict settlement, though some one limitation may seem contingent, yet the general intent shall prevail.

Where the general intent appears to make a strict settlement, though some one limitation may, according to the words, seem contingent, yet the general intent shall prevail.

This construction is very agreeable to the rule of law, and the intention appearing upon the face of Sir *William Dodwell*'s will is much stronger in support of the present determination than in any of the cases.

The case of *Napper* versus *Sanders*, *Hutton* 118. is very strong to shew the intent shall controul the words; there was a limitation determinable upon the death of husband and wife.

Margaret Sanders seised in fee makes a feoffment to the use of herself for life without impeachment of waste, and after to the feoffees for 80 years, if one *Nicholas Sanders* and *Elizabeth* his wife should so long live; and if the said *Elizabeth* survive *Nicholas* her husband, then to the use of *Elizabeth* for life without impeachment of waste, and after the decease of the said *Elizabeth*, to the use of *Posthumous Sanders*, son of the said *Nicholas* and *Elizabeth* in tail; and for default of such issue, to the use of *Elizabeth*, wife of *John Napper*, and *Dorothy Sanders* and *Frances Sanders*, one of the lessors, and to the heirs of their bodies, remainder to the right heirs of *Margaret* the feoffor; *Margaret Sanders* dies, and *Dorothy* dies without issue, the feoffees enter, *Elizabeth Sanders* dies *Nicholas* yet alive, and *Posthumous* dies without issue; *John Napper* and his wife and said *Frances* entered, and were possessed until the defendant, as son and heir of *Margaret*, ousted them.

[782] The question was, Whether the remainder in tail to *Posthumous* and the remainder in tail to *Elizabeth* and *Frances* were contingent or executed; and it was resolved by all the court, that the remainders were not contingent on the estate for life, which was to come to *Elizabeth Sanders*, wife of *Nicholas*, but were vested presently; and it was agreed that the estate for life, if she survive her husband, was contingent, and when that had happened, being by way of limitation of an use, it shall be interposed when the contingency happened; as in *Chudley*'s case, *Coke*, *lib.* 1. *fo.* 133. and judgment was entered for the plaintiff.

This was besides a construction of uses in a feoffment, therefore more difficult to be come at than in a will, where intention has great weight, and the court more liberal in pursuing that intention.

And

And yet in that case the contingency of *Elizabeth* surviving *Nicholas* was held only to affect her estate for life, and not the subsequent limitations.

So in like manner, *In case my daughter shall depart this life without issue of her body living at her decease*, is a contingency which affects only the limitations to the trustees under Sir *William Dodwell's* will, till Sir *Henry Nelthorpe* attain his age of twenty-one, but not the subsequent limitations to Sir *Henry Nelthorpe* after he should attain his age of twenty-one, or to the *Lethieulliers* in case he died before twenty-one and without issue.

Brown and *Cutter*, Mr. Justice *Raymond's Reports*, 427. upon a special verdict in *B. R. John Check* had issue four sons *Humphry*, *Robert*, *Anthony*, and *John*, and made his will in writing thus:

First, I will that my wife shall have and enjoy all my houses, &c. in *Thames Ditton* during her natural life, if she do not marry; but if she do marry, then I will that my son *Humphry* shall presently after his mother's marriage enter and enjoy the said premisses to him and the heirs male of his body; and for default of such issue, to my son *Robert* and the heirs male of his body, with remainders to his other sons, and so over to strangers.

The question was, Whether the remainder to *Humphry* was a contingent or vested remainder.

Mr. Justice *Jones* delivered the opinions of all the judges, except the chief. The intention of the devisor being the pole star that ought to guide the judges in the exposition of wills, it is necessary to consider what estate the testator intended for his wife by his will; I am of opinion that he intended her an estate only *durante viduitate*, which Lord *Coke* says, *Co. Lit.* 42. *a.* is, in judgment of law, an estate for life determinable: [783] and in pleading, the grantee shall say, that by virtue thereof he was seised for life, which being premised, the question will be, whether the wife has an estate *durante viduitate*; the words are, I will that my wife shall have and enjoy all my houses, lands, &c. during her natural life, if she do not marry; for what is an estate during widowhood, but an estate to continue till she doth marry; then the words, but if she do marry after my death, is no more than, in case the estate shall determine, then I will that my son *Humphry* shall presently enter, &c. by which it is most plain that here is no contingent remainder, but an estate vested in *Humphry* to take effect in possession upon the marriage or death of the wife.

That the intent of the devisor was such, appears by the limitation, for he intended the land should go to his sons, and their issues male, and not to the females, which would not be if this should be a contingent remainder.

So, in that case, where the testator gives the estate to his wife for life, and in case she marry, then to his son *Humphry* immediately after his mother's marriage, though *Isabel* the wife did not marry, yet it was adjudged to be a vested estate in *Humphry*.

This

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This was a much stronger construction than in the present case, and even a rejecting of words to come at the intention, which there is no occasion of doing here, but retaining the words, the whole may be consistent.

As to my own case of *Bellasis* versus *Uthwaite* (1), *Hill.* 1737, it depended upon the particular penning of the will.

Sheffield and *Lord Orrery*, *December* 4, 1745 (2), likewise before me, depended on the construction of a very obscure will of *John* Duke of *Buckingham:* it being taken for granted, that the house was leasehold, I gave my opinion that it went over.

But that will was so very particularly penned, no argument can be drawn from it, which can be applicable to the present or any other case.

I determined that the limitation to Mr. *Sheffield* was good by construing the words, If I have no lawful issue, to mean issue at the time of the testator's death.

On the whole, it was clearly the intention of the testator in the present case, to confine the contingency of Mrs. *Tracy*'s dying without issue of her body living at her death to Sir *Henry*
[784] *Nelthorpe*'s dying before 21, and that the subsequent limitations to Sir *Henry Nelthorpe*, after attaining 21, and likewise to the *Lethieulliers*, are vested remainders, and therefore the first exception must be allowed (3).

N. B. After *Lord Chancellor* had given his opinion, Mr. *Murray*, who was of counsel for the defendants, started a new point, that if the words *in case my daughter should die without issue living at her death*, did not make the limitation to Sir *Henry Nelthorpe* after he attained his age of 21, and the subsequent limitations to the *Lethieulliers*, a contingent remainder, yet it will still remain a question, whether these words will not give Mrs. *Tracy an estate in tail by implication.*

Because, if the words should not have this construction there is a case may happen which would be attended with great hardship and absurdity, that the eldest son of Mrs. *Tracy* may die, leaving a daughter, an only child, and yet as the limitation to the first son of Mrs. *Tracy* is only in tail male, such daughter would be set aside in favour of strangers, and no provision being made for her under the will, by any charge upon the real estates, or any otherwise, she must starve, unless Mrs. *Tracy*, by being considered a tenant in tail, now she has attained her age of 21, as incident to such estate, can suffer a recovery, and by that means, in case of the accident of a daughter's being the only child born of her son, have it in her power to provide for her.

Lord Chancellor ordered that the cause should stand over, upon this single point, till the first day of exceptions after *Christmas*.

(1) *Ante* 1 vol. 426. S. C.
(2) *Ante* 282. S. C.
(3) *Vide Fearne's Conting. Rem.* 341, 342. 4th *Ed.*

Lethieullier versus *Tracy*, *April* 25, 1754.

THIS cause came on again upon the question reserved, Whether the defendant Mrs. *Tracy*, by the words of Sir *William Dodwell*'s will, *in case my daughter shall depart this life without issue of her body living at her decease, takes an estate tail by implication?*

S. C. ante 728, 730, 774. post, 793. S. C. Amb. 204, 220.

The words in the will *if my daughter depart this life without issue of her body living at her decease*, do not give her an entail by implication, but to the issue living at her deceafe, an estate by purchase (1).

The Attorney General, Mr. *Murray*, of counsel for the defendant.

The true question is, what is the construction upon the devise of the real estate, Sir *William Dodwell* was seised of at the time of his death, for the estates to be purchased by the trustees, with the personal estate and rents, and profits of the real, are to be settled in the same manner, and therefore liable to the same construction.

[785]

The power of barring or not barring remainders, has never been taken into consideration on questions of entails under wills, for courts of law, upon legal devises, must construe them as they are.

It is most manifest the testator in this case meant so far to make a settlement of this estate, that it should go to the issue of his daughter, and Sir *Henry Nelthorpe* must take, upon failure of the very same issue, when of age, as under age.

Whether the limiting of an estate in tail male only to his eldest grandson is a slip in the testator or not, is not the question; for most of the cases in this court have been owing to inadvertency, but the whole will turn upon this, whether the testator did not intend to provide for issue *in infinitum*.

He cited 1 *Mod.* 54. *Love* versus *Windham*, 1 *P. Wms.* 759, *Langley* versus *Baldwin*, *Sid.* 47. *Helmes* versus *Plunkett*, 1 *Lev.* 11. *Wyld* versus *Lewis*, *E. T.* 1738. 1 *T. Atk.* 432.

N. B. *The last was principally relied on by the defendant's counsel.*

Richard Wyld, at the outset of his will, says, as to all my worldy estate I dispose of as follows, and then devises to his wife *Elizabeth*, now the wife of the defendant, all his lands, &c. not settled in jointure generally; and then follow these words, If it shall happen that my said wife *Elizabeth* shall have no son or daughter by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premisses to return to my brother *John Wyld*, if he shall be then living, and his heirs for ever, only paying to his two brothers, *A.* and *B.* the sum of 150*l.* within one year after the decease of the said *Elizabeth*.

Elizabeth had a daughter born after the death of the testator, and who is since dead.

(1) *Vide Robinson* v. *Robinson*, *ante* 736, 739. and note.

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The bill was brought by *John Wyld*, the brother of the testator, and his heir at law, to restrain the defendants from committing waste; and the question was, what estate *Elizabeth* took by the will, whether in tail, or for life only.

Your Lordship said, in that case it seemed clear from the words of the will, As to all my worldly estate, *&c.* the testator intended a disposition of the whole, and therefore the objection that the grandchildren by construction of the plaintiff's counsel are liable to be excluded, is a very strong argument for construing this an estate tail, *and the inclination to avoid this absurdity* has been the principal reason for construing words of the singular number in a collective sense, as including the descendants of the first taker.

[786] Great stress, you was pleased to say, had been laid upon the word *such*, as if it restrained the word *issue* to mean only such son or daughter, and that the precedent words, *if Elizabeth has no son or daughter*, will not raise an estate tail by implication.

But you was of opinion the words, *if Elizabeth has no son or daughter* must be taken in the same sense as having no issue, and then the word *such* will have no weight, but will amount to the same thing as if he had said for want of issue, and the words having no issue, or dying without issue, have been always considered in the same light both in law and equity.

And if preceding words are proper to create an estate tail, the legal operation of them, your Lordship said, cannot be controuled by these subsequent provisions.

The bill there was dismissed.

Mr. *Tracy Atkyns* of the same side.

If the testator had meant to give his daughter a bare estate for life, it is natural to suppose he would have added the words *without impeachment of waste*, as he has done in the limitations to Sir *Henry Nelthorpe* and the two *Lethieulliers*; but as he has not done this, it is not an improbable conjecture he intended by the subsequent words, *and in case that my said daughter shall depart this life without issue of her body living at her decease*, to give her *an entail*, and that her estate for life should merge in the inheritance; else it must seem extremely odd upon the face of the will that the last remainder-man may cut down all the timber upon the estate, and yet the only child of the testator should not be able upon any emergency to raise one shilling.

So that considering Mrs. *Tracy* as a bare tenant for life, which is contended for by the plaintiff's counsel, it makes the testator guilty of the greatest absurdity, as well as void of natural affection, to tye up his daughter's hands so strictly, and yet leave strangers at full liberty to commit what waste, and make what havock they please with his estate.

But if the testator's meaning and intention was, what is insisted on by the defendant's counsel, that his daughter should by these subsequent words take an estate tail, it accounts in the most natural manner imaginable for the testator omitting to make her tenant for life *without impeachment of waste*, and at the same time

time acquits him of using his daughter hardly, because, by giving her an estate-tail, he knew, as incident to such estate, she would be dispunishable of waste. LETHIEULLIER v. TRACY.

[787]

The material part of the exception is, that the Master in the said settlement hath, &c. (*vide this exception*) *Whereas*, according to the intent and meaning of the will of Sir *William Dodwell*, it ought to be, *and in default of such issue*.

But as the words in the will are general, *without issue of her body*, it is *nomen collectivum*, and takes in the whole generation *ex vi termini*; what right then have the counsel for the plaintiffs to make the testator speak their meaning instead of his own?

When he intends to confine it to the immediate antecedent limitation, he does in every other part of the will make use of the word *such*; as for instance, after the remainder to Mrs. *Tracy*'s first son in tail male and to the second, third, and other sons, and the heirs of their respective bodies, he says, for want of *such* issue, then to her daughter and daughters, &c. the same after the limitations to Sir *Henry Nelthorpe*'s sons, and the *Lethieulliers*' sons.

But in the last limitation to his daughter, the testator leaves out the word *such*, and puts it, *if she die without issue*; he left out *such* designedly, and with great propriety here, because there are no immediate antecedent words to which it could refer; for between the limitation to her first and every other son and her daughters, and the present devise, there are several intervening distinct clauses, making at least two sheets of his will, quite foreign to the limitations of the estate.

Therefore, I beg leave, as the counsel for the plaintiff were so extremely fond, the last time the exception was argued, of introducing substantive independent clauses, to insist this is clearly one.

For being a new sentence, the word *and*, with which it begins, ought to have the same construction as if it had been *item*, *or else in case my daughter shall depart this life*, &c. there being no sort of connection with the immediate preceding clauses, as they relate to trustees receiving rents, laying them out in lands, and to an allowance for his daughter's maintenance and education at different periods of her age.

So that the testator plainly intended to give, by implication, an estate tail to his daughter and her issue indefinitely.

The great objection, I apprehend, will be the testator's limiting in a former part of the will an express estate for life to his daughter; I shall, by way of answer, take the liberty of borrowing some of Lord *Hale*'s arguments in the case of *King* and *Melling* (1), and apply them to the limitation to the defendant under her father's will.

[788]

"We are, said he, in the case of an estate-tail created by a will, and the intention of the testator is the law to expound "the testament; therefore a devise to a man and his heirs

(1) 1 *Vent*. 214, 225. S. C.

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"male, or a devise to a man, *and if he dies without issue, &c.* "are always construed to make an entail. It must be admitted, that if the devise were to *B.* and the issue of his body, "having no issue at that time, it would be an estate-tail; "for the law will carry over the word issue, not only to his "immediate issue, but to all that shall descend from him.

"My second reason, said Lord *Hale*, is from the manner of "the limitation, which is to his issue, and of his body, &c. "*phrases agreeable to an estate-tail*, and the meaning of a testator "is to be spelled out by little hints. 4 *Jac. Robinson*'s case. A "devise to *A.* for life; and if he died without issue, then to remain, *A.* took an entail.

"It is objected, said Lord *Hale*, that the limitation is expressly *for life*, and from thence arises the great difficulty; but "I answer, that though the words do weigh the intention that "way, yet they are balanced by an apparent intention that "weighs as much on the other side, that as long as *Barnard* "should have children, the land should never go over to *John*, "for there was as much reason to provide *for the issue of the issue* as "the first issue.

"Again: It is possible that he did not intend him but an estate "for life, and it is by consequence and operation of law only that "it becomes an estate-tail."

I need not give your Lordship the trouble of an application, for every word in Lord Chief Justice *Hale*'s reasoning upon that case speaks equally strong to the present case.

I shall not presume to state the case of *Wyld* versus *Lewis* again, because it has been laid so fully before your Lordship already; but only beg leave to insist, that it does in a great measure take away the force of the argument drawn from the word *such* by the counsel of the other side, because if supplied, which I hope, for the reasons I have already given deduced from the will of Sir *William Dodwell*, shall not be; *yet the word* such *here, no more than in the other case, will not have any weight, but amounts to the same thing as if he had said for want of issue; and the words having no issue, or dying without issue, have been always considered in the same light both in law and equity.*

The present is not so strong a case, because certainly *sons and daughters*, in the plural number, of Mrs. *Tracy* may with much
[789] more legal propriety be construed in a collective sense as including all the descendants of the first taker, when, as in *Wyld* versus *Lewis*, it was *only son and daughter* in the singular number.

All the arguments of intention from any clauses in Sir *William Dodwell*'s will subsequent to the last limitation to Mrs. *Tracy*, which are used to shew the testator meant to give her an estate for life only, may be thrown out of the case; for, according to the authority of *Wyld* versus *Lewis*, *if the preceding words are proper to create an estate-tail*, the *legal operation of them cannot be controuled by those subsequent provisions.*

And though much stress has been laid upon the case of *Blackbourne* versus *Edgeley*, in 1 *P. Wms.* yet even there Lord *Macclesfield* (notwithstanding the determination of *Bampfield* versus

versus *Popham*, 1 *P. Wms.* 54. when Lord Keeper *Wright* was greatly assisted) exploded the notion that words of implication should not turn an express estate for life into an estate-tail, and said, that if I devise an estate to *A.* for life, *and after his death without issue*, then to *B.* this will give an estate-tail to *A.* LETHIEULLIER v. TRACY.

I hope therefore, upon the whole, Mrs. *Tracy* will be considered *as tenant in tail*, in all the estates, or at least in the lands her father died seised of, being a legal and not an equitable devise.

Mr. *Noel*, for the plaintiff, distinguished the case of *Langley* versus *Baldwin* (1) from the present, because the testator having omitted there to limit the estate beyond the sixth son of *A.* and as there might be a seventh who was not intended to be excluded, therefore to let in the seventh and subsequent sons to take, the court held the words, in case *A.* should die without issue male of his body, did in a will make an entail.

But here the eldest son of the tenant for life has an estate-tail, and may bar the remainder if he arrives at 21, and by that means provide for his daughters, if he should die without issue male, and therefore is not liable to the same objection of hardship as in that case where the seventh son would have been totally disinherited.

He relied principally on the case of *Luddington* versus *Kime*, reported in 3 *Lev.* 432. Lord *Raymond* 203. *Eq. Cas. Abr.* 183. there *J. S.* devised to *A.* for life without impeachment of waste, and if he shall have issue male, to such issue male and his heirs for ever; and in case *A.* dies without issue male, to *B.* and his heirs; the court held that *A.* took an estate for life, the remainder contingent to his issue male in fee; for the words, And in case *A.* dies without issue male, are not to be taken substantially and absolutely, but relatively to what was said before; and these oblique words cannot be intended to destroy by implication the estate expresly devised before to the issue male [790] of *A.*

The case of *Bampfield* versus *Popham*, 2 *Vern.* 449. is no authority on this point, because a deed produced at the second argument in this cause put an end to the question.

The counsel for the plaintiff have no authority to reject the words living at her decease, because thrown in by the testator to shew his intention, that if his daughter left no issue living at the time of her death, then the remainder-men to whom he devised the estates should preserve his name and family by taking the name of *Dodwell*.

Mr. *Wilbraham*, of the same side, asked in what manner the defendant's counsel insisted the Master should limit the estates in the conveyance to be settled by him.

Lord Chancellor said, if he understood them right, they intend to limit the estates purchased under the trusts since the testator's decease to Mrs. *Tracy* for life, and to her first son and the heirs male of his body, then to the second and every other son in tail gene-

(1) 1 *Eq. Ab.* 185. *pl.* 29. 1 *P. W.* 759. 1 *Vef.* 26. S. C.

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ral, then to daughters in tail general, and then to Mrs. *Tracy* and the heirs of her body.

It was admitted by the defendants' counsel to be their intention the estates should be so settled.

Mr. *Wilbraham* said, as it happens that the female line is by a slip unprovided for, there being no limitation to the daughter of the eldest grandson of the testator, the defendant's counsel would make the subsequent words in the will, *if my daughter should depart this life without issue of her body living at her decease*, create an estate-tail in her, so as to enable her to provide for the contingency of the eldest son dying, and leaving a daughter only.

As your Lordship was, at the former hearing, of opinion to confine the contingency of Mrs. *Tracy*'s departing this life without issue of her body living at her decease to Sir *Henry Nelthorpe*'s dying before 21, and he is dead under age and without issue, I apprehend there is no occasion to insert these words in the conveyance of the trust estates, but that, after the limitations to Mrs. *Tracy* and her issue, the next immediate limitations may be to Mr. *Smart* and Mr. *Charles Lethieullier*.

With regard to the case of *Wyld* versus *Lewis*, the words there, In case my wife have no son or daughter by me, I beg leave to insist, is the same thing, as if he said, In case my wife have no issue, there being no other issue but sons or daughters.

[791] *Blackbourne* and *Edgeley*, 1 *P. Wms*. 600. comes the nearest of any case to the present; for notwithstanding there was the same expression there as well as here, *dying without issue*, yet Lord *Macclesfield* supplied the word *such*, and confined it to the sons and daughters of his sons, and was of opinion that these words, *dying without issue*, did not give an estate-tail to *Ewer Edgeley* by implication.

We hope, upon the whole, your Lordship will think the law has gone far enough, and that the court will make a stand and not carry the construction of estates tail by implication still further than any of the cases have yet gone.

Mr. *Murray* Attorney General's reply:

The general question is, What limitations are to be inserted in the conveyance of the trust estates?

By what rule is it to be governed? Why, by the construction of law upon the devise of the legal estate of which Sir *William Dodwell* died seised, and will equally extend to the trust estates; for there cannot be two rules of construction, one in a court of law, and another in a court of equity.

Your Lordship cannot here, any more than at law, introduce words which are not in the will.

The single question is, Did the testator intend a remainder to Sir *Henry Nelthorpe* and the *Lethieulliers*, except upon a total failure of issue of his daughter's body?

It

It has been said in this case here is the word *such*, but that is begging the question; for in the limitation to Sir *Henry Nelthorpe* it is, in case my cousin Sir *Henry Nelthorpe* shall happen to die before he attain his said age of twenty-one years *and without issue*; but if it had been *such* issue, it could not have meant a qualified issue, but general, because it is limited to sons and daughters of Sir *Henry Nelthorpe*, and therefore such must refer to issue generally. LETHIEULLIER *v.* TRACY.

Suppose Mrs. *Tracy* had died during the minority of Sir *Henry Nelthorpe*, leaving a son, could the trustees have taken the estate? I apprehend not; as the contingency has not happened of Mrs. *Tracy*'s dying without issue living at her decease.

Now, though possibly the testator might intend that the children of his grandaughters should take preferably to the great grandaughter, the daughter of his eldest son, as being nearer to himself; yet, I apprehend, he clearly meant to provide for the descendants of his own body, before he limits the estate over to the remote remainder-man.

Sir *William Dodwell* is providing for the issue of his daughter, and therefore it never can be imagined, as he has limited the estate to the heirs general of his grandaughters, so as that the remainder-men cannot take without failure of issue of them, that he was not equally intending, the issue of that issue, in a direct line, the great-grandaughter, should also take before the remainder-men.

The power of barring remainders by a common recovery, is never an argument against construing an estate-tail by words of implication, being only a consequence, and therefore will have no weight in determining this question.

In the case of *Wyld* versus *Lewis* there was no doubt but the son or daughter of the testator's wife would have taken for life; but unless the court construed it an estate-tail by implication to the first taker, the grandchildren could not have taken, but it would have gone to a remainder-man, a collateral relation, the brother of the testator, exclusive of the immediate descendants in a right line.

In *Blackbourne* versus *Edgeley* the court said, "it did not appear "the testator intended *Ewer Edgeley*'s sons daughters should "take, for he might think that on *Ewer Edgeley*'s dying with-"out issue male his name and family would be determined, for "which reason he might limit it over to the daughters of *Ewer* "*Edgeley* himself."

But if the court had been of opinion, from the words of the will, it was the intention of the testator there that *Ewer Edgeley*'s sons and daughters should take, then Lord *Macclesfield* would have construed the words, If *Ewer Edgeley* died without issue to give an estate-tail by implication to him, in order to provide for the daughters of his eldest son; so nothing can be drawn from thence which will affect the present case, if your Lordship should be of opinion the testator here meant to give the preference to the issue of the eldest son of his daughter before the remainder-men.

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His own issue must naturally be supposed to be the first objects of his care, and was the primary provision intended by him; and what shews it strongly, is, that he did not oblige the person who should marry his daughter, or any of the female descendants of his daughter, to take his name; because he thought such an injunction might prevent his daughter from marrying to advantage, as other families might retain the same regard to a family name as himself, and therefore only lays this injunction on his great-nephew Sir *Henry Nelthorpe*, a collateral relation, and on the *Lethieulliers* strangers to the testator.

[793] If the testator could have so great a regard to the welfare of his grandchildren, it is not very probable that it would equally extend to all the imediate issue issue of his body, *in infinitum*, in exclusion of remainder-men, one of which was only a collateral relation, and the others distant ones of his first wife?

A near contingency, or a remote one, will not weigh with the court in determining this question; but however the fact is, that there is only one son born of Mrs. *Tracy*, who is seven years old, and she has never had any children since; so that the accident may as well happen as not, it being an equal chance whether, if he leaves issue, it is a son or daughter; and if the latter, should the construction prevail which the plaintiff's counsel contend for, such daughter would be totally unprovided for, and the estate go to strangers, in prejudice to the testator's immediate lineal descendant, his great grandaughter, the daughter of his eldest grandson.

I rest the whole therefore upon this; whether the testator intended that all the issue should take before the remainder-men, or that remainder-men should take before the issue female of his eldest grandson.

Lord Chancellor directed the cause to stand over till the 29th instant.

Lethieullieur versus *Tracy*, *April* 29, 1754, *The Cause stood for Judgment*.

LORD CHANCELLOR,

S. C. ante 728, 730, 784. S. C. Amb. 204, 220.

THIS comes before the court upon an exception taken to the Master's report, whereby he approves of a conveyance to be made of the estates purchased pursuant to the will of Sir *William Dodwell* and the decree in the cause.

And likewise on a supplemental bill, in order to bring the infant *Dodwell Tracy*, the son of the defendant Mrs. *Tracy*, and grandson of the testator, before the court.

The exception is taken by *Smart Lethieullier* and *Richard Rogers*.

"For that the Master in the settlement hath, between the limitation to the daughters of Mrs. *Tracy* and the heirs of their "respective bodies, and the estate limited to *Smart Lethieullier* "and to *Charles Lethieullier* and their issue male successively, "inserted these words, and in case the said *Mary Tracy* shall "depart this life without issue of her body living at her decease,

"*whereas*

"*whereas according to the intent and meaning of the will of Sir* LETHIEULLIER v. TRACY.
"William Dodwell *it ought to be, and in default of such issue.*"

This bill brings the whole matter before the court, and therefore I may properly determine the points now before me.

There are two questions:

First, Whether the words in *that* case, *my said daughter depart this life*, &c. are sufficient, and co-operate so in construction of law, as to turn all the subsequent remainders into contingent ones.

Secondly, If they have not that operation, whether the testator intended that all the issue of Mrs. *Tracy* should take and enjoy before the *Lethieulliers*, and whether these words will not give Mrs. *Tracy* an estate-tail by implication, and consequently a power to bar the remainders by a recovery.

As to the first question, I have already given my opinion, that the words will not make the limitation to the *Lethieulliers* a contingent remainder.

I have no doubt from the words of the will, but that the trust estates to be purchased with the personal estate, and the rents and profits of his real, and to be settled to the same uses with the legal estate of Sir *William Dodwell*, are liable to the same construction, though there be some cases which may be contrary, and seem to distinguish between legal and equitable estates.

Taking that to be so, there can be no question but Sir *William Dodwell*, intended to make as strict a settlement as he possibly could, and I think the presumption of that intention is strengthened by the blank in the will.

For after the limitations to so many persons under the will, he could not bring himself even then to limit it to his own heirs, but had it in his thoughts to limit it over still further.

This is a circumstance at least in favour of his intention to make a strict settlement.

The consequence is, that he has either used words to support the intention, or he has failed in point law.

If the words have the operation of turning the estate for life into an estate-tail by implication, it would give Mrs. *Tracy* a power to bar the remainders; in case I had been of opinion to extend the contingency to the *Lethieulliers*, and the accident had happened of Mrs. *Tracy*'s surviving her son, and he had left only a daughter, she could not even then be said to take by the will, but it would descend in fee to the mother, the daughter of the testator, and she might by that means provide for such daughter of her son. [795]

But I will not go over this part of the case again; *Luxford* versus *Lee*, 3 *Lev.* 125. as I have before observed, is very strong for this purpose.

These words, *if she depart this life*, &c. seem to me from the whole tenor of the will to be relative to the trust created by the will.

The testator's view was, as his daughter and Sir *Henry Nelthorpe* were both infants, to increase and accumulate the bulk

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of his real estate, for after adding to his daughter's maintenance, he directs the personal estate to be laid out again in further purchases.

He in the next place considers Sir *Henry Nelthorpe* in the same light, and gives the same direction during his minority for accumulation of real estates; it is plainly therefore a trust of these profits during the minority of Sir *Henry Nelthorpe*, and an accumulation of them just in the same manner.

But when he comes to the limitations to the *Lethieulliers*, the testator makes no accumulation of profits, but devises to them in the manner mentioned in the will, with a limitation to the trustees to preserve contingent remainders.

What could be his meaning in this? Why, the testator imagined his daughter might die a minor during the infancy of Sir *Henry Nelthorpe*, and that he likewise being very young at that time might also die before he came of age, and therefore was providing against both the accidents, which more and more induces me to be of opinion these words do not make a contingency to the *Lethieulliers*, but with respect to them must be considered as *a vested remainder*.

I shall now give an opinion as if I was doing it upon a special verdict.

Upon the words, *If my daughter depart this life without issue of her body living at her decease*, my opinion is, that they are to be considered as if he had added *during the minority of Sir Henry Nelthorpe*; and this determines the first question.

But supposing they do not affect the subsequent remainders, then secondly, whether the testator did not intend that all the issue of Mrs. *Tracy* should take and enjoy before the *Lethieulliers*,

[796] and whether these words will not give Mrs. *Tracy* an estate-tail by implication; and for this reason particularly, as there is no other way of letting in *the daughter of the eldest son* but by giving the first taker such estate by implication.

It is certainly true, that there are several cases in law where the words, *if he die without issue*, have been held to create an estate-tail by implication.

A great misfortune to *Westminster hall* there is no report of Lord Ch. J. *Hale* himself of the case of *King* versus *Melling*, nor any copy of his argument, for, as reported in *Ventris*, it is very imperfect.

I cannot help saying that it is a great misfortune to *Westminster-hall* there is no report of Lord Chief Justice *Hale* himself of the case of *King* versus *Melling*, nor any copy of his argument, for it is very imperfect in *Ventris*, especially as to the cases said to have been cited by *Hale*.

But however, there are several cases, where a limitation for life at the outset of a will hath been by subsequent words turned into an estate-tail in this court in order to provide for the issue; but there is no case comes up to this; the reason is that if the connecting words were turned into words of limitation, they would give an estate-tail; as a devise to *A.* and if he die without issue, then to *B.* or to *A.* for life, and if, &c. then to *B.* by conjoining them they give an inheritance.

But in the present case, turn these words of contingency into words of limitation, *If my daughter depart this life without issue, &c.*

&c. *during the minority of Sir Henry Nelthorpe*; they will not give an entail, but will give *to the issue living at her decease*, &c. an estate by purchase, for then they will run thus: LETHIEULLIER v. TRACY.

To Mrs. *Tracy* for life, to her first son and the heirs male of his body, to the second and every other of her sons and the heirs of their respective bodies, to her daughters and the heirs of their respective bodies, remainder to such issue as she shall leave at the time of her death in the minority of Sir *Henry Nelthorpe*.

So that these words will make this particular species of issue take by purchase; and place these words in what manner you please, they can make no limitation in tail.

But then it is said, it is extremely hard the daughter of the son should be totally unprovided for.

It is apprehended by the counsel on both sides, that the mistake in the will was letting in daughters of his second and other sons, and that the intention of the testator was to prefer his grandaughters to the great grandaughters, the daughters of the eldest and other sons of Mrs. *Tracy*; but it would be too much to construe these words to make an entail by implication, merely because a case may happen in which a great grandaughter of the testator may be unprovided for, especially as it is admitted the testator meant to prefer his grandaughters, being nearer to him in point of relation than his great grandaughter, the daughter of his eldest grandson. [797]

This brings it very near the case of *Blackbourne* versus *Edgeley*, for there the court supplied the word *such*.

Besides, in this case the son of Mrs. *Tracy* when twenty-one may bar all the limitations; and though it is insisted on, and very truly, the power of suffering a common recovery is a consequential one; and courts of justice, as was done in the case of *Shaw* and *Weigh*, *Eq. Cas. Abr.* 125. will construe according to the line of succession without being influenced by the effect it may produce; yet there have been cases where it is a measuring cast, in which the consideration of barring has had weight; as in the case of *Bampfield* versus *Popham*, where notwithstanding it was objected that unless the words, issue male of *Popham* create an estate-tail in him, a posthumous son would not take; yet it was answered by the court, that though it might have been intended such posthumous son should take, this was but a remote mischief or contingency, whereas it was very obvious that the testator meant it should not be in the power of *Popham* to bar the remainders, which it was plain he could do if he had an estate-tail; so that this being a mischief near and easy to be foreseen, it was certainly in the intent of the testator to obviate and prevent the same. 2 Stra. 798. Fortesc. 58. Fitzgib. 7. 8 Mod. 253. 382. Barnard. B. R. 54.

This is a case that proves by the authority of very great men (for it received a solemn determination before Lord Keeper *Wright*, Lord Chief Justice *Holt*, Lord Chief Justice

Where the intention of a testator in creating an estate-tail is not plain but very doubtful, judges will lay hold of any circumstance rather than put it in the power of a person, on a remote contingency, to bar all subsequent remainders.

LETHIEULLIER v. TRACY.

Trevor, Sir *John Trevor*, Master of the Rolls, and Mr. Justice *Powell*, who all gave their opinions, that *Popham* had only an estate for life) that where the intention of creating an estate-tail is not plain, but very doubtful and uncertain, judges will lay hold of any circumstance rather than put it in the power of a person upon a remote contingency to bar all subsequent remainders.

This is my opinion, and therefore let the first exception be allowed, for *Smart Lethieullier* and *Charles Lethieullier*'s estate must, according to the testator's intent and meaning, be limited to them, and to their first and other sons in tail-male respectively, as *remainders vested*, and to take place upon failure of issue of Mrs. *Tracy* generally.

Case 295. *Ex parte Hellier*, *April* 30, 1754.

[798]

The execution of a second will is a revocation of the first, and the canceiling the second afterwards does not set up the first again (1).

THERE was a question in a cause before Sir *George Lee* as judge of the prerogative court, whether the execution of a second will is a revocation of the first, though the second is afterwards cancelled, and whether such cancelling sets up the first will again? Sir *George Lee* gave sentence that it was a revocation, and that the cancelling the second did not set up the first.

A petition was preferred to Lord Chancellor on the part of the principal defendant in that cause, for a full commission of delegates, and also a cross petition, praying that the commission may issue to judges of the common law and civilians only.

LORD CHANCELLOR,

Discretionary in the court whether they will grant a full commission of delegates.

It is in the discretion of this court, whether they will grant a commission of delegates to judges of the common law and civilians, or to them and the lords spiritual and temporal.

I have granted a full commission where the jurisdiction of bishops is in controversy, or any question is depending that concerns the canon and ecclesiastical law.

Where legal and ecclesiastical matters come in question the judges in both are appointed.

The principal intention in granting full commissions is, where legal and ecclesiastical matters come in question; and in order to balance the objection of a partiality to one law more than to the other, and to obviate this, the judges in both are appointed.

Where it is a mere matter of law a commission issues to judges and civilians only.

The present matter is upon the point of a will, and altogether a question of law; and therefore I shall dismiss the petition of the party appellate, and according to the prayer of the cross petition direct a commission of delegates to judges and civilians only.

(1) *Contra Goodright* on the *dem.* of *Glazier* v. *Glazier*, 4 *Bur.* 2512.

Sparrow versus *Hardcastle*, *Easter Term*, *May* 6. 1754. Case 296.

ON the 28th of *July* 1716, *Cyril Arthington* made his will and thereby devised unto Sir *Walter Hawksworth* and others, their heirs and assigns, all his manors, messuages, tithes, tenements and hereditaments whatsoever, in the county of *York*, or elsewhere in *England*, and all his estate, right, title and interest therein, either in law or equity, upon trust to pay * all his just debts out of the rents and profits, by leasing, &c. and subject thereto in trust for his nephew *Cyril Arthington*, the plaintiff's father, for life, remainder to his first and other sons in tail male, and for want of such issue, in trust for his nephew *Sandford Arthington* in like manner, and for want of such issue, in trust for his nephew the defendant *Thomas Hardcastle*, in like manner, and for want of such issue in trust for his nephew *Cyril Hardcastle*, in like manner, and for want of such issue in trust for his nephew *Sandford Hardcastle*, in like manner, *remainder in trust for his own right heirs for ever.*

S. C. Amb. 224. The estates devised under the will of *C. A.* must remain unaltered to the testator's death, for any alteration or new modelling makes it a different estate, and occasions a different construction at law.

[*799]

On the 13th of *October* 1720, the testator made a codicil to his will, reciting that he had made his will as aforesaid, but having just reason to be displeased with his nephew *Cyril Arthington*, and with *Thomas Hardcastle*, and *Cyril Hardcastle*, three devisees mentioned in his will, did, on serious consideration, think fit to alter the same as to them only, and did thereby revoke and make void all devises in the will made to them, or any of them, or any of their heirs, as fully as if the same had never been made.

On the 21st of *November* 1723, he made another codicil, reciting or mentioning the said will, and the first codicil, and did thereby declare, that being then reconciled to his nephew *Cyril Arthington*, he considered he was his next heir at law, and that it would be a great piece of hardship, if not injustice, to disinherit him, he therefore on further consideration, thought fit, and did thereby revoke and make void the said codicil, so far as related to his nephew *Cyril Arthington*, and his heirs, but not with respect to *Thomas Hardcastle* and *Cyril Hardcastle*, and their respective heirs; and did thereby will, that his said in part recited will, and all devises and bequests therein, should stand and remain in their original full force and effect with respect to *Cyril Arthington and his heirs.*

By indenture dated the 20th of *November* 1723, made between *Cyril Arthington* the testator of the one part, the said Sir *Walter Hawksworth* and Sir *Walter Calverley* of the other part, for divers good considerations, he the said *Cyril Arthington* did grant to Sir *Walter Hawksworth*, &c. and their heirs, *all the advowson, donation and right of patronage* of, in, and to the rectory and parish church of *Addle*, and all the estate, right, title, interest, property, claim and demand whatsoever, of him the said *Cyril Arthington*, of, in, and to the said advowson, *to hold to them*

Sparrow v. Hardcastle

them and their heirs, to the only use and behoof of them and their heirs and assigns for ever.

And by another indenture dated the 21st of *November* 1723, between the said parties, reciting the first mentioned indenture, it was thereby witnessed that the true intent and meaning of the said recited grant, and of the parties, was, and is, that the advowson, donation and right of patronage was and is so granted, [800] upon trust that the said Sir *Walter*, &c. or the survivor of them, and his heirs, should present to the said church when the same should become void, such son of *Robert Jackson*, the then incumbent, as should at any time after such vacancy, or at any time within five months next after such vacancy be by law qualified to be presented to the said church.

And in case there should be two or more such sons so qualified, that then such of the said sons, as the said *Cyril Arthington, or his heirs*, by writing under his or their hands and seals nominated, should be presented, and in default thereof, the trustees should present such of the said sons as he or they should think meet.

And in case at the time of the first, or any future vacancy of the said church, there should be living a son or sons of *Robert Jackson*, who should then be by law incapable to take such church, the trustees should present such clerk thereto as by the said *Cyril Arthington, or his heirs*, should be nominated, and in default of such nomination, such clerk as they should think meet.

So that every such clerk so to be presented during the incapacity of such son or sons of *Robert Jackson*, should become bound to the trustees in such sum of money, and with such securities, as the trustees should direct, to resign such church so soon as any son of *Robert Jackson* should be qualified to be admitted thereto, and that such clerk, giving such security, should be by the said trustees requested to resign such church, it being the true meaning thereof, that no clerk thereof should at any vacancy of the church be presented thereto, during the incapacity of any son of *Robert Jackson*, to take such church, or be presented thereto, who should refuse to enter into such security, to resign the same; the church being intended to be a provision and preferment for such of the sons of *Robert Jackson* as should be by law qualified to be presented thereto.

Provided, that in case at the time when the church should first become vacant, or at the time of every future vacancy, there should be no son of *Robert Jackson* living, or in case any son of *Robert Jackson* being by law qualified to take such church, should neglect or refuse to accept a presentation thereto, that in any of the said cases, the trustees should stand seised of the advowson, donation and right of patronage of the church, *in trust for* Cyril Arthington and his heirs, *and on request should convey over the same to his or their use*.

And in the same case of there being no son of Robert Jackson *living at the time of such vacancy, or of refusal to accept such presentation as aforesaid*, the trustees should present such clerk to such church as *Cyril Arthington or his heirs*, should in writing nominate

nominate to be presented, and in default of such nomination, *then such clerk should be presented as the said trustees should think meet.* SPARROW *v.* HARDCASTLE.

Cyril Arthington the grantor and testator died soon after, without issue.

And *Cyril Arthington* his nephew was his heir at law, who is also since dead, and left *Cyril Arthington* his son and heir at law, who is also dead under age, and without issue, leaving the plaintiffs his sisters, and heirs at law.

Robert Jackson the father died soon after the death of *Cyril Arthington* the father, whereby the church became vacant, and the defendant *William Jackson* his son being duly qualified, hath since been presented to the said church by the said trustees, and is now the incumbent.

The two trustees are dead, and the defendant Sir *Walter Blackett* is the son and heir of Sir *Walter Calverley*, the surviving trustee, and the legal estate in the advowson is in him.

The plaintiffs by their bill charge that the trust is determined on *William Jackson*'s being presented, and the advowson and right thereto ought to be assigned to them, the heirs at law of *Cyril Arthington*, and that in case the church should become vacant, they would have a right to present thereto.

For that the second codicil being executed before the conveyance and deed of trust, the said deed and conveyance as executed afterwards, is a revocation of the will *pro tanto*, and revokes the trust of the advowson, which, by construction, might otherwise be in the issue male of the devisee *Cyril Arthington* the nephew, or, for want thereof, go over according to the devises in the said will.

For, as the bill charges, by such express act and deed the testator did limit and retain the said advowson *to his own right heirs*.

Their bill, therefore, is brought for the heir of the surviving trustee to convey the legal right and title in and to the said advowson, rectory and parish church to the plaintiff, and that the indenture of conveyance, and deed of trust herein respectively, dated the 20th and 21st of *November*, 1723, may be delivered up to the plaintiffs.

The defendant *Thomas Hardcastle*, otherwise *Arthington*, the son of *Sandford Hardcastle*, the last remainder-man under the will of the testator, being in possession of the rest of the real estates devised thereby, by his answer insists, notwithstanding the conveyance of the advowson, and the trust thereof, he is in equity intitled thereto under the will and codicils, as devisee of the real estate, and that it ought to be conveyed to, or to the use of the defendant, and the heirs male of his body, in regard the testator intended to give the benefit of one presentation only, to one of the sons of *Robert Jackson*, but when that purpose was served, then the advowson should go along with the residue of his real estate; and that, admitting the deeds were executed after the second codicil, they ought only to revoke the said will *pro tanto*, and not intirely as to the whole inheritance of the advowson, [802]

vowson,

Sparrow v. Hardcastle.

vowson, and disunite and separate it from all the rest of his real estate, especially as it is of the yearly value of 350*l.* and that the plaintiffs, as heirs general of the testator, have not any right or title to the advowson, other than the reversion in fee thereof, after the estate-tail therein now vested in the defendant, and therefore insists, that he is intitled to the benefit of the trust thereof, and that Sir *Walter Blacket* shall be decreed to convey the legal estate of the advowson to them.

There was a single witness in the cause who proved that both the deeds were executed by *Cyril Arthington* the uncle, and Sir *Walter Calverley*, at the same time, and after the second codicil.

Lord Chancellor,

I shall make only one question, Whether the grant of the advowson made by the testator to two persons and their heirs, and the declaration of trust at the same time, are a revocation of the will, or not?

It depends on a short fact.

His Lordship then stated the case from the will, the deeds and the codicils.

There is a material clause at the end of the declaration of trust of the advowson.

If there be no son of *Robert Jackson* living at the time of such vacancy, or in case of a refusal to accept as aforesaid, the trustees should present such clerk, &c. *and in default of such nomination, then such clerk should be presented as the said trustees should think meet.*

A case put under the deed itself, in which these very trustees may have a right of nomination and presentation.

After the death of *Cyril Arthington* the testator, a vacancy happens, and one of the sons of *Robert Jackson* is presented, and the trust served.

[803] And the bill is brought by the plaintiffs, as heirs at law of the testator, and *Cyril Arthington* his nephew, for the purposes before mentioned.

The general principle on which the question depends, and enforced by cases, is, that a man at the time of making a will must have a disposing capacity and mind.

That he must at the time be seised of the estates he devises.

And such estates must remain in the same plight, and unaltered, to the time of the testator's death; for any alteration, or new modelling, will make it a different estate, and occasion a different construction at law, unless in some exceptions, which I shall mention by and by.

A feoffment in fee executed after a will, is a revocation, even if there was no livery; *idem* as to a bargain and sale, though not inrolled.

It has been determined, and must be agreed to be law, that if a man seised in fee makes a will, yet, if he afterwards executes a feoffment in fee, this is a revocation; nay, has been held so, if there was no livery on that feoffment, because it imports an intention in the testator to revoke (1).

(1) *Beard* v. *Beard*, *ante* 73. *Parsons* v. *Freeman*, *ante* 748, note.

The

The same as to a bargain and sale, which, though not inrolled before the testator's death, is a revocation. SPARROW v. HARDCASTLE.

Lord *Lincoln*'s case, *Eq. Cas. Abr.* 411. which turned upon a conveyance by *Edward* Earl of *Lincoln*, to trustees, in consideration of an intended marriage with Mrs. *Calverly*, and though proved there never was any intention of such marriage, but a mere whim of the Earl, yet determined with great deliberation in this court, and afterwards in the House of Lords, to be a revocation of his will.

A conveyance from the *E* of *L.* to trustees, in consideration of an intended marriage with *C.* though there never was such intention, determined to be a revocation of his will.

The courts have gone further still, and held, that if a man was seised in fee, and afterwards, thinking he had only an estate-tail, suffers a recovery, in order to confirm his will, *yet this is a revocation of it* (1).

If a man seised in fee, thinking he had an estate-tail only, suffers a recovery to confirm his will, yet it is a revocation of it.

But in the present case a distinction has been attempted to be taken, which is, that the testator being seised of the legal estate, and having the same day executed a deed for a particular purpose only, must be considered as one intire transaction, and not a revocation: and it is insisted, that the testator's declaring the trust to himself and his heirs, is the same thing as if he had left the trust to result to him and his heirs, and would have passed by the devise of the land, and must be considered as part of the old estate.

I find no authority for this, and am of a different opinion. [804]

It has been said, that if a man seised in fee makes a will, and afterwards a conveyance in fee in trust, and then declares the trust only as to part, that the residue shall not be revoked.

But I think otherwise. If a man seised in fee of a trust, and afterwards devises it to another, and then takes the legal fee-simple, I thought this no revocation in the case of *Parsons* and *Freeman*, in *Michaelmas* term 1711, (*vide ante* 741. 749.) but it was not the principal point, and only laid *obiter*.

I find a case in the books opposite to the point now in question, and which gives great countenance to my opinion. *Roll's Abr.* 616. *pl.* 3. *Dyer* 73. *pl.* 10. between *Montague* and *Jeffreys*.

If a man, having feoffees to his use, before the statute of 27 *H.* 8. had devised the land to another, and afterwards the feoffees made feoffments of the land to the use of the devisor, and after the statute, the devisor died, the land shall pass by the devise, for after the feoffment the devisor had the same use as he had before.

I looked into *Dyer*, but do not find the point determined; but there is plainly a reference in it to the case of *Montague* and *Jeffreys*, *M.* 38, 39 *El. B. R.*

Lord Chief Justice *Roll* mentions more points determined in that case than are stated by any of the reporters, and therefore probably he had a much better note of *Montague* versus *Jeffreys* than any other person besides.

(1) *Marwood* v. *Turner*, 3 *P. W.* 163.

SPARROW v. HARDCASTLE.

The use at law was the beneficial and profitable interest, the same as a trust equity, and which remained in the same plight after the feoffment as before, and the feoffees there granted the dry legal estate to the devisor.

But the distinction relied upon is, that this is a conveyance made for a special particular purpose to serve the trust only created for the benefit of Mr. *Jackson's sons*, and when that was served ought to affect the estate no further, and is compared to the case of mortgages and securities for money.

A mortgage for a term of years, made subject to a will, is in point of law, only a revocation *pro tanto*; but mortgages in fee, though otherwise at law, are considered as partial revocations in equity.

[805]

The excepted cases out of the general rules of revocations are confined to mortgages and conveyances for raising money to pay debts.

The excepted cases out of the general rules of revocations have been confined to mortgages and securities for money, and to conveyances for raising money to pay debts.

A mortgage in fee after a devise, is a revocation in law, otherwise in equity.

Hall versus *Dunch*, 1 *Vern.* 329. *A.* devises lands, and then makes a mortgage thereof in fee, this is a revocation in law, but otherwise in equity: before Sir *John Churchill*, *Master of the Rolls*; an appeal to the Lord Chancellor *Jeffreys*, who confirmed the decree.

Vernon versus *Jones*, 2 *Vern.* 241. was the case of a wife and children unprovided for, but notwithstanding that, Mr. *Vernon* has reported it with *a quære*.

The cases were certainly right, because they were mortgages and securities for money.

But that the deed of grant here is a revocation of the will, is as clear as the sun.

Consider on what the case of mortgages and securities depends.

Though in the case of mortgages the conveyance be of a real estate, yet, in the consideration of this court, the thing conveyed is regarded merely as a personal interest, for having no quality of a real estate, it is no revocation of the devise of a real estate.

They depend on the general grounds of being conveyances for a particular purpose, and on their being pledges for money only, and though the conveyance be of a real estate, yet in the consideration of this court, the thing conveyed is considered merely as a personal interest, for it has no quality of a real estate, and therefore is no revocation of the devise of real estate at all, the testator having only created a chattel interest, and is the same thing as if he had created a term for years for a particular purpose, which is in point of law a chattel interest.

But compare this with the present case, here the legal estate is actually conveyed by the grant, so likewise is the trust by the subsequent deed, for the profits of the accruer of the advowson are conveyed.

The latter part of the declaration of the trust is very material to shew, that not only the whole legal estate, but the whole trust, is parted with, for the heir of the grantor is to present, and therefore makes a total alteration, has to the last day of the six months to present, and after this, the trustees, and the heir at law of the surviving trustee, so that the beneficial interest

is

is given to them, not that the case wants the assistance of this circumstance, but it is an ingredient, and devisees must take it bound generally by this new declaration of the testator.

[806]

If the distinction, contended for by the defendant's counsel, was to prevail, it would overturn a great number of authorities.

It is not to be controverted, but that the favour of courts to heirs at law, I mean judicial favour, has prevailed in some instances; and Lord *Trevor* takes up this very consideration in the case of *Arthur* versus *Bockenham*, *reported in Holt's Cases* 750; which, though I do not allow to be a book of authority, yet, in this instance, seems to be a copy from his Lordship's manuscript.

There having been an uniform series of opinions in this point, it ought not to be varied.

Upon the whole, there having been an uniform series of opinions in this point, it ought not to be varied: *and therefore I am of opinion, in this case, that the will was revoked by the deed.*

But as the priority between the will and the grant depends upon the evidence of one witness only, who swears to a fact thirty years ago, if Mr. *Hardcastle*, the defendant, will try upon an issue the priority of the will and grant, I will direct such issue.

Lord Chancellor allowed the defendant time to consider, till the 10th of *May*, 1764.

N. B. *The defendant, upon that day, declined trying this fact upon an issue, and acquiesced under the decree.*

The Attorney General versus *Bowles and others, July* 24, 1754. Case 297.

S.C. 2 Vef. 547.

W. B by will, the third of *May* 1745, gave 500*l.* to *T. W.* and *J. B.* on trust, to lay out 200*l.* in building a school-house, *&c.* and the remaining 300*l.* to be laid out in land, *or some real security*, to be a maintenance for the master; the executrix refusing to pay the 500*l.* an information, brought in the name of the Attorney General, to have the trusts of the will, in respect to this charity, carried into execution. What the testator has directed to be done, with regard to the 300*l.* is contrary to the statute of Mortmain, 9 *Geo.* 2. and void; but the 200*l.* may be laid out in building a school-house, on any lands in the village of *N.* though not in the purchase of lands.

WILLIAM BOWLES, Esq; being possessed of a large personal estate, on the 3d of *May* 1745 made his will, and gave five hundred pounds to be raised out of his personal estate unto the defendants *Thomas Wavell* and *Joseph Bowles*, their executors and administrators, upon trust, that they should lay out part thereof in building a small school house in the village of *New-church*, with a little house adjoining for a schoolmaster; and thereby directed, that the purchase of the ground and expences of building should not exceed two hundred pounds; and the remaining three hundred pounds, he directed, should be laid out in land, *or some real security*, to be a maintenance for the master: all which he appointed to be done with the advice of the proprietor of *Longbridge*, and the vicar and churchwardens of *New-church*, for the time being, or any two of them.

Attorney General v. Bowles.

The testator died in *July* 1748, and his widow and executrix soon after proved the will, but refused to pay the five hundred pounds to the trustees; upon which they brought the present bill, in the name of the *Attorney General*, at their relation, to have the trusts of the will, in respect to this charity, carried into execution; and that the executrix may pay the trustees the five hundred pounds, with interest, to be applied for the charitable purposes directed by the will.

The principal question in the cause is, Whether the devise of the five hundred pounds is within the statute of Mortmain, 9 *Geo.* 2. *c.* 36. *sect.* 3. "All gifts of lands, &c. or of any charge affecting lands, or of any stock, or personal estate, to be laid out in lands, &c. for charitable uses, which shall be made in any other manner, shall be void."

Mr. Attorney General *Murray*, for the plaintiffs, insisted, that the words, *or real security*, seemed to be set by the testator in contradistinction to the first part of the will, the laying out the money in the purchase of land; and that his intention was to make a permanent, subsisting security, for the annual maintenance of the school-master, which may be done by investing it in government securities, and meant such a security as this in opposition to bonds, or any other precarious personal security.

He cited the cause of *Vaughan* versus *Farmer* (1) 1737, and *Gatterell* versus *Baker* in 1747 (2). In one case, there was a sum of money given *to erect a schoolhouse*; and in the other, *to erect a hospital*; and in both cases your Lordship held it was not within the last statute of Mortmain.

Mr. *Wilbraham*, for the defendant *Elizabeth Bowles* the executrix, and residuary legatee of the testator *William Bowles*, insisted that, by the words *real securities*, the testator meant mortgages, and is so understood in common parlance; and your Lordship in those decrees, where money is directed to be laid out in government or *real securities*, takes it in this sense.

He cited the case of *Jones* versus *Humphreys*, determined by the late Master of the Rolls, where he held that the devise of a mortgage to a charity is void, being within the statute of Mortmain, 9 *Geo.* 2.

Lord Chancellor,

This act of parliament must receive a natural construction, and such a one as will most effectually answer the end of the legislature.

[808] The intent of the act is not to restrain charity, but to prevent the heir's being disinherited by surprize.

The general intention of the statute is not to restrain charity, but to prevent the disposition of real estate, and unwarrantably or by surprize disinheriting the heir at law.

To be sure the two parts of the bequests in Mr. *Bowles*'s will may fall under different considerations.

With regard to the two hundred pounds, there is no doubt his intention was to dispose of it in the purchase of ground, and to build upon it a house for a schoolmaster: if there had been

(1) 2 *Vef.* 182. S. C. *Semb.* (2) S. C. cited 2 *Vef.* 185.

any

any land in this parish appropriated to any other charity, and the schoolhouse had been permitted to be built there, I do not see but this would have effectually answered the intention of the testator.

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Such a devise as this is certainly contrary to that clause in the act of parliament, which does as well restrain the giving *personal estate to be laid out in land*, as the devise of land itself.

The act restrains the giving personal estate *to be laid out in land*, as much as the devise of land itself.

In the cases cited by Mr. Attorney General, as it was not absolutely necessary to lay out the sums devised in the purchase of freehold lands, but might, at the discretion of the trustees, be invested in leasehold estate, renewable from time to time, it was held for that reason not to be within the statute of Mortmain.

Therefore if the trustees can shew me any charitable donation in the parish already where there is ground on which the two hundred pounds may be laid out for building a school-house, I shall be of the same opinion in this case, and therefore will not dismiss the information as to this part, but leave it to the trustees to lay proposals before the court (1).

The meaning of words must be taken in the same sense as before the act, and new ideas not suffered to be annexed to them in order to evade the statute.

With regard to the remaining three hundred pounds, I am of opinion it is clearly within the act of parliament; for I must take the meaning of words just in the same sense as before the act, and must not suffer new ideas to be annexed to them in order to evade the statute, which in a great measure would be defeating it.

A known established distinction in this court, between government and real securities.

Real is a term adopted in the law, and must be understood to mean landed securities only.

I do admit, that where one purpose is lawful, and the other unlawful, the court have laid hold of the former to answer the charitable purpose; but here, the money is not only directed to be laid out in land, but in some *real security*. I can take these words only in the common sense and acceptation; for there is a known established distinction in this court between government and *real securities*, and the latter means mortgages or other incumbrances affecting land (2).

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Real composition does not mean a security for the payment of the composition, but land substituted in lieu of tithes.

The word *real* is a term adopted in the law, and can never be understood in any other sense than *landed securities*; as for instance, in the distinction which has been made between *real composition* and modusses, *real composition* does not mean any substantial, permanent security for the payment of the composition, but land substituted in lieu of tithes, or a rent-charge issuing out of land.

The information in this respect therefore must be dismissed; but with regard to the other part, I will give the trustees an opportunity of laying proposals before me, of investing the money in such a manner as will best answer the charitable purpose.

I declare, in the first place, the 200 *l.* which by the testator's will is directed *to be laid out in land, or some real security for the maintenance of the schoolmaster*, is contrary to the statute of 9 *Geo.* 2. and

(1) *Vide Vaughan* v. *Farrer*, 2 *Vef.* 182. *Attorney General* v. *Tyndall*, *Amb.* 614. *Attorney General* v. *Hyde*, *Amb.* 751. *Attorney General* v. *Nash*, 3 *Bro. Cha. Rep.* 588.

(2) *Vide Attorney General* v. *Meyrick*, 2 *Vef.* 44. *Attorney General* v. *Caldwell*, *Amb.* 635.

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2. and void: and as to so much, let the information be dismissed.

With regard to the 200*l.* I declare, the same cannot be laid out lawfully in the purchase of lands, but that the same may be lawfully laid out in building a schoolhouse upon any lands in the village of *New-church*, which now doth or may belong to that parish; and the trustees are to be at liberty to lay proposals before the court for this purpose.

Case 298. *Anonymous. August* 3, 1754.

A decree must be inrolled before you can plead it in bar to a second suit, for the same matter (1).

A Plea of a former suit and decreee, in bar to the present bill; it appearing, that the decree was not signed and inrolled, Lord Chancellor would not allow it, as it is the standing rule of the court, that you cannot plead in this manner before inrolment; and therefore directed it should stand for an answer, with liberty to except.

(1) *Vide Kinsey* v. *Kinsey*, 2 *Ves.* 577.

Case 299. *Wortley* versus *Birkhead, the same Day. A Demurrer for want of Equity. The Attorney General Counsel for the Demurrer.*

S. C. 2 Ves. 571. After a decree in a cause, a new original bill cannot be brought between the same parties, and for the same matters.

AFTER a decree in the cause, a new original bill was brought between the same parties, stating the very same matter as in the former, and all the proceedings in it, and the hearing before Lord Chancellor was in *December*, 1748.

The material part of the decree, as to the present suit, was a reference to the Master to take an account of the plaintiff's securities mentioned in that cause, and of what they had received

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from rents and profits with common directions; and the Master was to inquire into the priority of the incumbrances; and the estate in question was decreed to be sold, and the money arising from the sale to be paid to incumbrancers, according to their respective priority.

The present bill states the several proceedings before the Master; and that the plaintiff had produced a deed of the 29th of *November*, 1724, and another in *July*, 1727; and then sets forth, that there were judgments in the 5th of *William* and *Mary*, and 9th and 10th of *April*, 1694, and also a prior mortgage, discovered since the hearing; but the Master not allowing the plaintiff to tack his mortgage to these securities now discovered; he therefore has brought his bill, insisting upon his right to do it; and prays, that he may be permitted to do it accordingly.

The demurrer goes to such part of the bill as seeks satisfaction for money claimed to be due, under the deeds of the 29th of *November*, 1724, or under the deeds of 1727, in preference to the defendant's demands, under a deed of a prior date in 1724; and

and submits to the court, that the plaintiff is precluded from this after the pronouncing of the decree. WORTLEY BIRKHEAD.

Or, if he is not precluded by the decree, that this bill is improper; because the plaintiff may then come under the decree, in order to have it settled, whether he has not a priority.

The assignments, which tack the plaintiff's deed to the old mortgage and judgment, bear date only in 1751 and 1754.

The priority between the plaintiff and defendants, in the former cause, is the material point put in question there.

What is prayed by this bill is, in effect, to alter and do what is directly contrary to the former bill, but not to reverse it.

There is no instance where this court has made, between the same parties, two opposite decrees, in two different causes; and therefore the present bill is totally improper.

Nor can there be any case cited, where this court have allowed of tacking incumbrances after a decree has been pronounced; and whether this is within or without the former decree, *quacunque via datâ*, it is improper, and the demurrer ought to be allowed.

Mr. *Yorke*, counsel of the same side:

This is a bill *primæ impressionis*. [811]

There are only two ways of proceeding:

Either, after a decree is signed, and inrolled, by a bill of review (1); or, if not signed, there must be an application to the court to bring a supplemental bill, in the nature of a bill of review (2); and an original bill cannot be brought to affect or alter a decree, unless in a case where the decree was obtained by fraud.

The rule, with regard to tacking, is, that a third incumbrancer taking in the first to give him a priority to the second mortgagee, must have no notice of the second at the time of his money lent; but this has never been allowed after a decree, nor do I know it has been suffered even after a bill brought.

Mr. *Hoskins*, of the same side:

The matter, which is discovered, is not a matter existing before the suit, but subsequent; and if this suit was suffered to go on, there would be two clashing decrees with each other.

This bill admits the priority of the defendants; and therefore if we have obtained a right by the decree, which directs our mortgage to be paid in the first place, this court can never, by a transaction between the present plaintiff and a stranger, vary the decree, as to a right actually attached to the defendant.

Such a proceeding as this would be big with absurdities; because, supposing the plaintiff should have a decree, yet, if another incumbrancer hereafter discovers a mortgage precedent to the plaintiff's, he may, with an equal right, bring an original bill

(1) *Taylor* v. *Sharp*, 3 *P. W.* 371. *Gould* v. *Tancred*, *ante* 2 vol. 534. *Norris* v. *Le Neve ante* 26.

(2) *Lewellin* v. *Mackworth*, *ante* 2 vol. 40. *Standish* v. *Radley*, *ante* 2 vol. 177. *Moore* v. *Moore*, 2 *Vef.* 597. *Mussell* v. *Morgan*, 3 *Bro. Cha. Rep.* 74.

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to vary the first decree and the second, so that there will be no end of litigations if this was to prevail.

Lord Chancellor,

If a bill of this kind was suffered, it would make great confusion in the proceedings of this court, and introduce the utmost inconvenience.

A third mortgagee cannot take in a prior security, to displace a second mortgagee, after a decree to account, and before the Master has made his report.

As to the third mortgagee's taking in a prior security, in order to oust and displace the second mortgagee, I am clearly of opinion, that such a transaction, after a decree to account, and before the Master has made his report, will not avail to the prejudice of the second mortgagee (1): *and therefore do allow the demurrer.*

(1) *Secus* where a third mortgagee buys in the first mortage *pendente lite. Robinson* v. *Davidson*, 1 *Bro. Cha. Rep.* 63.

Case 300.
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Kemp versus *Mackrell*, *August* 7, 1754.

S. C. 2 Ves. 579. On the circumstances of this case, though the plaintiff died before the costs were taxed, yet the defendant may revive for those costs (1).

A Cross-bill had been dismissed with costs, but before the costs were taxed or ascertained, the plaintiff died.

The question was, Whether the defendant can revive, or there can be any method of proceeding in respect of these costs.

The general rule is, that costs *moriuntur cum persona*, and it was said there was nothing to distinguish this out of it, nor does the case fall within any of the exceptions to the rule.

Lord Chancellor,

Upon the general rule as laid down, there can be no revivor; otherwise, if the costs had been taxed.

The right to costs is the same before taxation as after.

I always held this to be a hard rule, and a very nice distinction, the right to costs, is the same before taxation as after, only the *quantum* has not been ascertained.

This, I think, is one of the cases where the court ought to dispense with the strict rule.

Where there is a particular fund to answer the costs, the court will direct them to be paid out of that fund.

The cause was heard on the original and cross-bill at the same time, and the decree in the original bill gave the defendant his costs out of the surplus.

A cross bill is a defence, and so connected with the original; they are always considered but as one cause.

The cross-bill is a defence, and always considered so, and therefore but one cause; the court having given the defendant his costs in the original bill, can any thing be more natural than to deduct the costs he was to pay on account of the cross bill, out of what he is to receive on account of costs upon the original bill?

(1) *Vide Blower* v. *Morrets, ante* 772.

I am

I am of opinion the taxing of the costs in the cross bill ought to have been stayed till the Master had taken the account in the original, and it was seen what was due to the defendant in that cause, and that both are so connected together, they can be considered but as one only, and therefore the exception to the Master's report, for not allowing the defendant in the cross bill to revive for the costs against the plaintiff, who is dead, ought to be allowed.

KEMP v. MACKRELL.

In the Matter of Thomas Hogan a Lunatick, August 9, 1754. Case 301.

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THE petitioner had taken all the affidavits before himself notwithstanding he had been Solicitor throughout the cause.

Affidavits taken before a person who was a solicitor in the cause, cannot be read.

LORD CHANCELLOR,

If I had known this at the time, I would not have suffered the affidavits to have been read.

At common law it is always objected to, and discountenanced, and equally so in equity, from the inconvenience that would arise if such a practice was suffered; for this, and other reasons, the petition was dismissed with costs to come out of the pocket of the solicitor, who thus very improperly took the affidavits.

The petition dismissed, and the costs directed to come out of the solicitor's pocket who took the affidavits.

Ex parte Birchell, November 1, 1754. Case 302.

AN application on the behalf of *Sarah* and *Mary Birchell*, infants, that a guardian may be appointed, *Sarah* being 19, and *Mary* 12 years of age.

A guardian may be appointed, tho' no cause is depending (1).

And at the same time Mr. *Croucher* applied for leave to marry *Sarah*, the relations assenting.

LORD CHANCELLOR,

The first part of the petition is necessary, as one of the infants is so young.

But there is no sort of occasion for the latter, and goes upon a mistake and misapprehension of the marriage bill.

If persons would attend to the *Rubrick*, which is now of 150 years standing, they have a very easy method to pursue by publishing the banns in the church, and if there is no lawful impediment, nothing can prevent the marriage.

When I consider the *Rubrick*, and the act of uniformity, which takes in the very text of the *Rubrick*, I am astonished how licences ever got footing in this kingdom; and, for my own part, I could wish, that all marriages were by publication of banns only.

Lord *Hardwicke* expressed his wishes that all marriages were by publication of banns only.

(1) *Mellish* v. *De Costa*, *ante* 2 vol. 14.

I have

Ex parte BIRCHELL.

I have lately had a young gentleman and lady out of *Gloucestershire*, whose fortune was only 800 *l.* to petition me for leave to marry, which was putting themselves to a very needless charge, and therefore I mention this, to prevent, for the future, the trouble and expence to parties in such applications.

The uncle, Mr. *Robert Birchell*, appearing in court who is likewise the only acting executor under the will of the father, in which all his personal estate is divided in equal shares between the two daughters and his wife, agreeing to accept of the guardianship at the desire of the infants his nieces, he was appointed accordingly, though no cause was depending.

And *Lord Chancellor* said, after the order is drawn up, and he is properly guardian, it will be in his discretion to approve or not of the match proposed, but would give no directions himself on this part of the petition.

Case 303. *Ex parte Catcot, November* 1, 1754.

S. C. ante 1 vol. 209.

The administrator of a bankrupt intitled to the bankrupt's allowance, where he has divided 10 *s.* in the pound.

THE petitioner, who was administrator of *Tyrrel*, a bankrupt, applies to the court for the bankrupt's allowance, he having made a neat dividend of 10 *s.* in the pound

Lord Chancellor ordered that the assignee, out of effects in his hands, should pay the allowance to the petitioner, at the rate of 5 *l. per cent.* on the money got in, not exceeding the sum of 200 *l.*

Case 304. *Maitland* versus *Wilson*, *December* 17, 1754.

Where a plea is to the relief only and is directed to stand for an answer; the words *with liberty to except* must be added, to prevent the establishing it as a good answer (1).

LORD CHANCELLOR,

A Bill was brought to impeach the defendant's purchase of an estate that belonged to Mr. *Haslewood* of *Worcestershire*, for fraud and imposition, and insisting it should be considered only as a mortgage, the defendant not having paid near the value.

The defendant pleaded the purchase deed, the several sums which were the consideration, and, amongst the rest, a sum of 4958 *l.* odd money, really paid.

But then it was pleaded in such a manner, that it seems rather a recital of the purchase deed; whereas it ought to have been pleaded distinct and separate from the recital, and should have been averred by the plea, *that the said sum mentioned as the consideration in the deed, was really and* bonâ fide *paid.*

(1) *Sellon* v. *Lewen*, 3 *P. W.* 239. *Coke* v. *Wilcocks*, *Mos.* 74

This

This being a plea to the relief, and not to the discovery, if I was to direct it should stand for an answer, without the words, with liberty to except, it would be establishing it as a good answer, and therefore, to prevent this, it is necessary these words should be added.

MAITLAND v. WILSON.

Radford versus *Wilson, the same Day.* Case 305.

Where the bill charges particular and special instances of notice of the plaintiff's title on the defendant, his denial of notice generally is not sufficient.

LORD CHANCELLOR,

IN the present case there is a plea put in of a purchase for a valuable consideration without notice, cloathed with a possession of 40 years, (for the estate was bought in 1714), and all the equity set up by the plaintiff, the issue in tail, is, that there was notice of the will under which the estate-tail was created, and that there ought to have been a recovery suffered in the lord's court by the tenant in tail, the ancestor of the plaintiff, at the time the estate in question was purchased by the person under whom the defendant claims, and that a bare surrender only is no bar.

It has never been laid down, that a common recovery is necessary to bar an estate-tail in copyholds, and therefore I am of opinion, than an equitable estate-tail in a copyhold will be barred by a surrender in the lord's court.

Some judges who have sat here have been of opinion that an equitable estate-tail at common law might be barred, even by a deed of bargain and sale inrolled (1); but it has been held otherwise since, and now a recovery is necessary (2).

Here the instances of notice charged in the plaintiff's bill are particular and special, to which the defendant has given no answer, and therefore the plea must be over-ruled, for a general denial of notice is not sufficient, it must be denied as specially, and particularly as it is charged (3).

(1) 1 *Vern.* 440. *Beverley* v. *Beverley*, 2 *Vern.* 133. *Hopkins* v. *Hopkins*, ante 1 vol. 591.

(2) *Legatt* v. *Sewell*, 2 *Vern.* 552.

(3) *Vide Senhouse* v. *Earl*, 2 *Ves.* 450.

Hawley versus *Taylor, the same Day.* Case 306.

A general demurrer allowed to this bill; the facts as stated by the plaintiff himself being clearly a question at law.

THE bills states a right in the plaintiff to a quart in every four bushels of corn, brought to the market at *Brentford*, for toll, by virtue of a grant from King *James* the First, and that, in consideration of this, his ancestor built the market-place, and he is himself at a great expence in repairing it.

And further states, that the defendant, in order to incroach upon this right, and prevent the corn being pitched in the market as the grant directs, in combination with several farmers in the neighbourhood, has contrived that samples of corn should be brought [816]

[illegible] v. Taylor.

brought to his houfe, and hung up there, where the perfons who have occafion to buy, may come and deal by fample for what corn they want, and infifts that this is an incroachment upon his right, and defrauding him of the toll, and therefore has brought his bill for a difcovery of thefe matters.

The defendant demurred to the bill, for that it was a mere queftion at law, and the matters of fact fet forth by the complainant himfelf are infufficient for him to proceed upon, or to oblige the defendant to anfwer.

Lord Chancellor,

This is a cafe *ftricti juris*, and if the plaintiff is lord of the market, under a grant from the crown, he may bring an action at law (1).

Either the corn lodged at the defendant's is liable to toll, or not liable, which may be determined upon an action.

If the defendant ftops the corn from being brought to market, it is a foreftalling, and an indictment may be preferred againft him upon that account.

So that, upon the circumftances of this cafe, there is no fort of equity which will intitle this court to interpofe, and confequently the demurrer muft be allowed.

(1) *Vide Anon.* 2 *Vef.* 414.

Cafe 307. *Ex parte Matthews a Bankrupt, December* 20, 1754.

A perfon under a commiffion of bankruptcy may prove a debt in the right of his wife, and yet bring an action in his own right for a debt due to himfelf from the bankrupt (1).

MR. *Gary* proved a debt under the commiffion in the right of his wife, amounting to 5000 *l.* being her fortune under a marriage fettlement, and has alfo brought an action at law in his own right, for a debt due to him for goods fold and delivered.

The debt proved under the commiffion being fo large, prevents the petitioner from having his certificate.

Lord Chancellor,

The court undoubtedly will never fuffer a creditor to fplit a demand, and prove part under the commiffion, and profecute, at the fame time, a bankrupt for the remainder at law.

* [817] But this cafe is quite different; for here are two remedies and different rights, and, I fhould apprehend, he might even have done it, if the debts had been both in his own right.

The prefent is the ftrongeft inftance that can happen, the debt of 5000 *l.* being fecured to the wife by a judgment before marriage, and will furvive to her, if the hufband fhould die before her.

(1) *Ex parte Betteril, ante* 1 vol 109, *Ex parte Crinfez,* 1 *Bro. Cha. Rep.* 270.

Suppofe

Suppoſe one debt had been due to Mr. *Gary* by bond, and another upon an account current, and he had brought a bill here for the account, and an action at law upon the bond: theſe are two diſtinct things, and therefore the court will let him go on, both in law and equity.

[illegible] ſame [illegible] creditor by bond, and upon an account current may bring a bill here for the latter, and an action upon the former.

If, indeed, he was to bring a bill in equity for an account current, and an action at law for a particular *item* in that account, the court would in that caſe oblige the plaintiff to make an election.

In caſes of bankruptcy the court may determine in a ſummary way, and exerciſe a diſcretionary power; but notwithſtanding this, they govern themſelves by way of analogy to the uſual and ordinary proceedings in the court of chancery: and as the ſame rule would hold in the point of election, if Mr. *Gary* was carrying on a ſuit by bill here for one demand, and by action at law for the other, I am of opinion, in this caſe likewiſe, he ought not to be reſtrained from his double remedy, and therefore the petition muſt be diſmiſſed.

Baldwin verſus *Mackown*, *January* 18, 1754. Caſe 308.

A Supplemental bill brought againſt a defendant, who was no party to the original bill, to anſwer the matters charged in the original bill.

The defendant demurred; and for cauſe of demurrer ſhewed, that he was no party to the original bill, nor was any new matter pretended in the ſupplemental bill to be ariſen ſince the filing of the original bill.

The demurrer allowed by *Lord Chancellor* (1).

(1) *Vide Lewellin* v. *Mackworth*, *ante* 2 vol. 40.

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OF
The Principal Matters.

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ger children, remainder to his first, *&c.* sons in tail male, remainder in fee to himself. The executor of a bond-creditor of Sir *W. F.* brings a bill for an account of his personal estate, and if that falls short of satisfying the debts, prays that a sufficient part of the real estate may be sold: "Lord *Hardwicke* said, the real estate having never been assets of Sir *W. F.* the lands comprized in a settlement made after his marriage are not liable to his debts by specialty, for they are not specifick liens upon the estate." *Page* 631

Assets marshalled, and in what Order Debts are to be paid. See Specifick Legacies.

M. agreed to purchase an estate of the plaintiffs for 1200 *l. but died before he had paid the whole purchase money: M.* by will, after giving 800 *l.* legacy to his sister, devises the estate purchased, and all his personal estate to *J. K.* and makes him executor: *J. K.* commits a *devastavit* of the personal, and dies, and the purchased estate descends on *B. K.* his son. The court, to give the legatee a chance of being paid her legacy out of the personal assets, directs the plaintiff to take his satisfaction upon the purchased estate for the remainder of the purchase-money. 272

Assets descended on the heir at law must be applied to the payment of debts, before the lands can be charged which are *specifically devised.* 536

Attachment. See Solicitor.

Attorney and Solicitor. See Solicitor.

A matter coming to the knowledge of the party's attorney, *&c.* before the cause was heard, is notice to the party himself. 35

Though a country attorney acts by an agent in causes in this court, yet he is to be considered as the solicitor likewise, though he resides in the country; and what is known to him is constructive notice to his clients. *Page* 37

The wife an executrix of an attorney brought a bill for money due for business done by her husband, as the defendant's attorney. A demurrer to the relief, as a remedy, is at law under the statute of 2 *Geo.* 2. for the better regulation of attornies and solicitors. "Lord Chancellor *Hardwicke* allowed the demurrer." 740

Award. See Arbitrator.

If arbitrators are mistaken in a plain point of law, it is a ground to set aside an award; otherwise, if it had been a doubtful one. 494

An award being made by judges of the parties own chusing is final, unless there is collusion, or gross misbehaviour in the arbitrators. 529

A defendant is not obliged to set out the account between him and the plaintiff, after an award in his favour relating to that account; for a plea of an award is good, not only to the merits, but to the discovery. 530

Arbitrators are not bound to give notice of the time they intend to meet, or the particular place where. *ibid.*

Bailment.

SIR *John Hartop*, in 1729, lodged jewels for safe custody in the hands of *Seamer* a jeweller, inclosed in a paper that was sealed, and put in a bag, which was also sealed with the plaintiff's seal, and deposited at *Seamer*'s house; and the same day his clerk gave a receipt for them in these words; "Which "bag so sealed I promise to take care "of for Sir *John Hartop*, for my mas-"ter *James Seamer*," (signed) *Michael Hull:* and in the receipt all the jewels were specified. In *February*, 1735, *Seamer* broke both the seals, took out the jewels, and carried them to Mr. *Hoare*'s, the banker's shop, and borrowed 300 *l.* of the defendant; deposited the jewels as his own proper goods, and as a security for the 300 *l.*

and

A teſtator

Coroner.

Costs in Law and Equity. See Bond, Defendant, Bill of Revivor, Cross Bill, Affidavits.

Covenant. See Buildings.

Money.

Counsellor.

Court of Admiralty.

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Where

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A grandfather

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There

Insurance.

In what Cases a Legacy shall, or shall not, be a Satisfaction of a Debt or other Demand on the Testator's Estate. See **Satisfaction.**

Specifick Legacies. See **Assets, Marshalled,** &c. **Legacy. Executor.**

The

Quare Impedit. See **Presentation to a Church or Chapel.**

Real Estate. See **Personal, Debts, Infant Heir at Law, Money, Covenant, Condition, Water-Works, Spiritual Court, Infant, Securities.**

Release of Errors.

Rents and Profits. See Posthumous Child.

Replication. See Bill, Order.

Restraint on Marriage. See Marriage, Infant, Court of Chancery, Condition.

There

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Verdict.

Vested Interest. See Portions or Provisions for Children, Legacy, and the Division under Legacy, of Legacies or Portions vested, Lapsed, or Extinguished Debts.

Visitor and Visitatorial Power. See Charity, School, Hospital.

An

Though

Writ. See Process, and Ne Exeat Regno, Execution.

Writ of ad quod Damnum.

FINIS.